82-1788

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

NO. .....

ALABAMA POWER COMPANY,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For The Eleventh Circuit

APPENDICES C-G TO PETITION

S. EASON BALCH, SR.*
ROBERT A. BUETTNER
ALBERT L. JORDAN
JOHN F. MANDT
Balch, Bingham, Baker,
Hawthorne, Williams & Ward
600 North 18th Street
Birmingham, Alabama 35203
(205) 251-8100

TERENCE H. BENBOW
DAVID J. LONG
Winthrop, Stimson, Putnam
& Roberts
40 Wall Street
New York, New York 10005
(212) 943-0700

Attorneys for
Alabama Power Company

May 2, 1983

*Counsel of Record

CONTENTS

APPENDIX C

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD[1]

Michael C. Farrar, Chairman
Richard S. Salzman

In the Matter of

Docket Nos. 50-348A
50-364A

ALABAMA POWER COMPANY
(Joseph M. Farley Nuclear
Plant, Units 1 and 2)

June 30, 1981

DECISION

Opinion of the Board by Mr. Farrar:

This is the third antitrust case arising under Section 105c of the Atomic Energy Act[2] to reach us on the merits. The first, *Midland*, involved a nuclear plant being constructed by Consumers Power Company, which serves most of Michigan's lower peninsula. ALAB-452, 6 NRC 892 (1977).[3] The second, *Davis-Besse*, dealt with a number of reactors proposed for construction in Ohio and western Pennsylvania by several utility companies serving the City of Cleveland and the rest of the "CAPCO" territory. ALAB-560, 10 NRC 265 (1979).[4] Unfortunately, our rulings in both *Midland* and *Davis-Besse* did not come down until after the Licensing Board's two-step decision in the matter now before us.[5] Necessarily, then, that Board's opinions, in general carefully and thoughtfully crafted, were written before it had the benefit of any appellate guidance.[6]

---

[2]42 U.S.C. §2135(c).

[3]*Reversing and remanding Consumers Power Co.* (Midland Units 1 and 2), LBP-75-39, 2 NRC 29 (1975).

[4]*Affirming as modified Toledo Edison Co.* (Davis-Besse Units 1, 2 and 3), LBP-77-1, 5 NRC 133 (1977).

[5]The first of the Board's decisions (Phase I) dealt with what might be called the question of "liability" (LBP-77-24, 5 NRC 804 (April 8, 1977)); Phase II addressed the matter of remedies (LBP-77-41, 5 NRC 1482 (June 24, 1977)).

[6]As already indicated, at that point our *Midland* and *Davis-Besse* decisions had not been written. And, to this day, neither the Commission itself nor the courts have spoken about the merits of an NRC antitrust case: (1) Any need for further review of *Midland* was eliminated when the parties reached a settlement while the case was on remand below. That settlement was approved by the Licensing Board last August (LBP-80-21, 12 NRC 177); because the parties were in agreement, we declined to review the matter (ALAB-610, 12 NRC 174 (August 26, 1980)). (2) In *Davis-Besse*, on the other hand, the Commission declined applicants' request that it review our decision. The case was then appealed to the United States Court of Appeals for the Third Circuit under the name *Duquesne Light Co.* v. *NRC;* the applicants later withdrew their appeal and the case was dismissed on October 8, 1980.

In those opinions, the Board below ruled that Alabama Power Company's construction and operation of the two-unit Farley nuclear power plant would create and maintain "a situation inconsistent with the antitrust laws" within the meaning of the statute unless certain remedial conditions — including access for one of the intervenors by way of purchases of "unit power"[7] — were included in the nuclear licenses. No stay having been sought, the conditions imposed have been in force while the parties' cross-appeals have been pending before us.[8]

Alabama Power tells us in its appeal that none of its past conduct warranted the finding of antitrust "liability"[9] and that, in any event, the remedy selected was too drastic. Its opponents — the Alabama Electric Cooperative (AEC), the Municipal Electric Utility Association of Alabama (MEUA), the United States Department of Justice, and the NRC staff — take the opposite tack. Their appeals argue that the applicant's past conduct was more egregious than the Board found and that a more sweeping remedy is in order.[10]

As we explain in this opinion, we find the Licensing Board's rulings not fully in accord with the principles laid out in decisions issued by us since then. In terms of the positions taken by the parties here, the upshot is that Alabama Power's opponents are entitled to a somewhat more favorable result than they obtained below. Specifically, we find that AEC should be afforded ownership access to the Farley units and that, while applicant need not extend such access to MEUA, the municipals are entitled to access to applicant's transmission system.

---

[7]The Board below defined unit power as "power purchased on a contractual basis in the form of a percentage share of the output from a particular power plant. The cost of unit power includes the owner's cost of capital, costs of construction, cost of fuel and operation, and a rate of return on investment." 5 NRC at 1502.

[8]Unit 1 began commercial operation on December 1, 1977; Unit 2 recently received its operating license.

[9]That is, the finding that its activities under an unconditioned license to operate the Farley plant would maintain a situation inconsistent with the antitrust laws specified in Section 105 of the Atomic Energy Act.

[10]This capsule description of the parties' appellate positions is intended only to set the stage; it does not, of course, even begin to hint at the precise nature of the questions presented in the 1,000 pages of briefs filed with us. In that connection, the record below consisted, *inter alia*, of nearly 30,000 pages of transcribed testimony.

I.

BACKGROUND AND SUMMARY

By amending the Atomic Energy Act in 1970, Congress gave this Commission added duties to fulfill in connection with its licensing of nuclear power plants. Since that time, it has had to consider, in addition to safety and environmental matters, the antitrust ramifications of its licensing actions.[11] Specifically, as we said in *Midland* (6 NRC at 897, footnotes omitted):

> Under Section 105c of the Atomic Energy Act, it must review applications for permits to construct commercial nuclear power facilities to determine if the activities sought to be licensed would create or maintain situations inconsistent with the antitrust laws or their underlying policies. Where such a result would follow, the Commission may refuse a license (or rescind one previously issued) or attempt to rectify the anticompetitive consequences by attaching appropriate conditions to the license. As the Commission has reiterated, the Atomic Energy Act's antitrust provisions reflect "a basic Congressional concern over access to power produced by nuclear facilities" and represent legislative recognition "that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds [which] should not be permitted to develop into a private monopoly via the [NRC] licensing process . . . ."

The governing statute provides the procedures by which this review is to be accomplished; we have described its workings elsewhere.[12] Here, the

[11]The Commission's responsibilities in the antitrust sphere prior to 1970 were less definitive. See *Cities of Statesville* v. *AEC*, 441 F.2d 962 (D.C. Cir., *in banc*, 1969) and the history recited in *Toledo Edison Co.* (Davis-Besse Unit 1), ALAB-323, 3 NRC 331, 337-40 (1976).

[12]*Kansas Gas and Electric Co.* (Wolf Creek Unit 1), ALAB-279, 1 NRC 559 (1975).

review was duly initiated when the Commission referred Alabama Power's construction permit application to the Attorney General of the United States for his advice concerning its potential antitrust consequences. The Department of Justice's analysis led it to respond that the plant should not receive an unconditional license and that an antitrust hearing should be held. In that connection, petitions to intervene filed by AEC and MEUA were granted by the Licensing Board (over the applicant's opposition). The entry of these two organizations alongside the statutory parties — the Commission staff and the Attorney General — completed the lineup of paticipants opposed to the award of an unconditional license to Alabama Power.

For introductory purposes, the business operations of the utility parties to the proceeding can be simply described.[13] The applicant, Alabama Power, is a wholly-owned subsidiary of the Southern Company, a public utility holding company which also owns Georgia Power Conpany, Gulf Power Company,[14] and Mississippi Power Company, all of which function under an interchange contract as the Southern Company Pool. Alabama Power generates, transmits and distributes electricity in central and southern Alabama (the eleven most northern counties in the State are served primarily by the Tennessee Valley Authority).[15] At retail, it has residential, commercial and industrial customers; it wholesales electricity to sixteen municipalities with their own distribution systems (twelve of which comprise the membership of the intervenor MEUA), to eleven rural distribution cooperatives,[16] and to the other intervenor, the Alabama Electric Cooperative. The AEC, in turn, is a generation and transmission cooperative whose membership is made up of four municipalities,[17] two industrial mills, and fourteen rural cooperatives.[18]

In terms of generating facilities, the applicant had in operation at the

---

[13]The Licensing Board's first decision contains a more complete description of the parties' operations as well as of those of other entities in the surrounding area. See 5 NRC at 820-33.

[14]Gulf Power operates in the Florida panhandle.

[15]Southern's operating companies thus embrace a contiguous area covering not only the Florida panhandle and much of Alabama but also southeastern Mississippi and most of Georgia. See D.J. Ex. 1008.

[16]Ten of these are members of the Alabama Electric Cooperative. See fn. 18, *infra*.

[17]There are a total of 22 municipally-owned systems in the geographic area of interest — the twelve in MEUA, the four in AEC, four others supplied at wholesale by Alabama Power but not affiliated with either intervening organization, and two that purchase their power requirements from TVA. The Licensing Board lists the town of Robertsdale, one of the unaffiliated municipal systems, as purchasing wholesale power from Riviera Utilities (see 5 NRC at 828); the town now gets its power from applicant. MEUA Brief, 25; APCO Reply Brief, 46-47.

time of trial thirteen hydroelectric plants and eight fossil-fueled plants, totalling over 6,000 megawatts in capacity.[19] By comparison, the AEC had two hydro and six fossil plants totalling 137 megawatts. The MEUA's members had no generating capacity.

We need not pause here to describe how the electric utility industry generally functions, in Alabama and elsewhere, to produce a reliable electric power supply. We went into that subject in detail in *Midland*,[20] and the Board below — after finding that "the principles of electric power supply production and coordination are generally applicable throughout the electric utility industry" and "do not vary significantly among electric utilities regardless of differences in locations * * * " — covered the subject quite thoroughly itself here. 5 NRC at 833-37.

The Licensing Board had to deal with numerous claims made by the applicant's opponents concerning alleged anticompetitive practices it was said to have engaged in through the years. In order to evaluate those claims in context, the Board first undertook to determine what product and geographic markets were relevant. It concluded that the applicant's service area constituted the relevant geographic market; the only product market it held relevant was that for wholesale power. In this regard, the Board rejected the notion that there was a market in either of the other suggested products — *i.e.*, retail power or coordination services.[21] 5 NRC at 879-894.

Using its findings delineating the relevant market as a touchstone, the Board found that the applicant possessed monopoly power in that market (5 NRC at 896-901); it then reviewed the evidence bearing on the applicant's alleged anticompetitive practices (5 NRC at 901-957). In all instances but five, the Board exonerated the applicant. With respect to those five transactions, however, it found the applicant's conduct to have been anticompetitive in nature and to have resulted in a situation inconsistent with the antitrust laws. The upshot was the conclusion that the

---

[Throughout this decision, "_____ Brief" refers to the appellate briefs filed by the parties on November 14, 1977; "_____ Reply Brief" refers to the responses filed on April 14, 1978. The parties will be referred to in such citations as APCO, AEC, MEUA, Justice, and Staff.]

[18]AEC supplies all the power requirements of its municipal and industrial members and three of the rural co-ops, as well as some of the needs of five other co-ops (who are also customers of Alabama Power); these constitute AEC's "on-system" members. It has no direct physical access to five co-ops in Alabama (who receive all their power from the applicant) and to one in Florida (served by Gulf Power). These six are called its "off-system" members.

[19]Of the eight fossil-fueled plants, applicant owns six of them outright, and shares in the ownership and output of the two others. The capacity figure shown includes only applicant's portions of the two shared facilities See 5 NRC at 821-22.

[20]See particularly 6 NRC at 950-57.

[21]Based largely on its rejection of the retail power market, the Board concluded that MEUA was not entitled to any access to the Farley units. See 5 NRC at 961.

activities under the nuclear licenses would maintain that situation (5 NRC at 957-961).

In other words, the Board held that the nuclear licenses had to be conditioned to ameliorate the effects of the anticompetitive situation then existing. The hearing then moved into its second phase, having to do with the appropriate remedy. The Board heard additional evidence on that score (but did not allow MEUA to participate[22]) and then rendered its second and final decision. It imposed a number of conditions upon the license, but rejected others which the applicant's opponents believed were necessary. In terms of access to the nuclear facility itself, the Board held that allowing AEC to purchase unit power was sufficient and that no ownership participation was called for.

As already indicated, all parties appealed. Among them, they manage to challenge — from both sides — nearly every significant holding made by the Board below.[23]

In deciding the matter, we take up first — and reject — certain broad arguments the applicant makes that, if accepted, would largely insulate its actions from antitrust scrutiny (Part II). In Part III, we then consider the questions raised as to the nature of the relevant markets. Although we are in total agreement with the Board below on its determination of the market for firm wholesale power, the principles we set out in *Midland* and *Davis-Besse* — both handed down after the decision below — lead us to disagree with the Licensing Board's rejection of the proposed markets for coordination services and retail power.

We proceed in Part IV to hold that the applicant has monopoly power in these other markets as well as in the wholesale market. We turn then to that aspect of the appeals which gives us the most difficulty: to what extent the applicant has used its monopoly power in violation of the antitrust laws or their underlying policies. The Licensing Board found it had done so only in certain respects; we believe that in reaching that conclusion it cast the applicant's activities in too favorable a light. With respect to MEUA, we also had to reassess the findings below in light of our holding expanding the relevant markets in the case. The additional violations we perceive and our findings relating to MEUA are discussed in Part V. Finally, we turn in Part VI to the question of what remedies are appropriate in light of our additional findings on "liability" together with those violations already perceived by the Board below.

---

[22]See 5 NRC at 1484 n. 5.

[23]As previously intimated (see fn. 17, *supra*), all parties filed concurrent briefs as appellants on November 14, 1977. Before their responsive briefs were due, we handed down *Midland*. The time for filing the second set of briefs was then extended to allow the parties to adjust their thinking to take *Midland* into account. Oral argument was held on March 8, 1979.

II.

APPLICANT'S ARGUMENTS AGAINST ANTITRUST SCRUTINY

The applicant raised three broad arguments against antitrust scrutiny. First, it argues that there is no room here for any finding of "liability" because it is so "pervasively regulated" that it cannot be held to possess monopoly power in the relevant market. It next contends that Section 105c of the Atomic Energy Act forbids a broad inquiry into its past activities for findings of liability — that any remedial action taken against it must be based solely on its predicted or potential future activities. Finally, it argues that the Licensing Board was wrong in basing its findings of liability on "anticompetitive conduct." According to the applicant, Section 105c requires that actual violations of the antitrust laws or the clear policy underlying them be found. We deal with these arguments in order.

A. Pervasive Regulation

As noted by the Licensing Board,[24] this proceeding arises under Section 105c of the Atomic Energy Act, which requires the Commission to determine in connection with its licensing of the Farley plant "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105c." The specified antitrust laws are the Sherman Act,[25] Wilson Tariff Act,[26] Clayton Act,[27] and the Federal Trade Commission Act,[28] For the purpose of making the required finding, the Licensing Board conducted an inquiry into the applicant's activities. Measuring these activities principally against three of the specified antitrust laws — the Sherman, Clayton and the Federal Trade Commission Acts — and the policies underlying them, the Board found that in five instances the activities engaged in by the applicant came within the proscription of those laws and their policies. In reaching these conclusions, the Board first conducted a market analysis (applying recognized antitrust principles) and found that a market for wholesale power existed in the applicant's area of operations. Proceeding further, it then found that the applicant enjoyed monopoly power in that market.

---

[24] 5 NRC at 812.
[25] 15 U.S.C. §§ 1-7.
[26] 15 U.S.C. §§ 8-11.
[27] 15 U.S.C. §§ 12-27, 44; 18 U.S.C. § 402; 29 U.S.C. §§ 52-53.
[28] 15 U.S.C. §§ 41-49.

The applicant vigorously objects to the finding that it possesses monopoly power in the relevant market. In the portion of its brief devoted to this issue,[29] applicant argues that to have monopoly power it must first be shown that it has the power to control prices or to exclude competitors from the relevant market. Detailing the extent to which it purportedly is regulated, it insists that this "pervasive regulation" by the state and federal governments precludes it from having either of the necessary powers.[30]

Applicant's contention is not new. We find that it merely attempts to put in different clothing a time-worn and discredited argument that seeks to justify immunity from the antitrust laws. It is too late in the day for the argument that state and federal regulation — even with respect to electric utilities — bring with them a form of dispensation from the antitrust laws. If any earlier doubt existed on this score, it was put to rest by the Supreme Court several years ago. As observed by the Court of Appeals for the Seventh Circuit in *City of Mishawaka, Ind.* v. *Indiana & Michigan Electric Co. (Mishawaka I,)*[31] citing *Cantor* v. *Detroit Edison Co.*,[32] it is a "now settled axiom that after *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359, 'there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities.' "

In recognition of this proposition, the applicant urges that it is not arguing for immunity from the antitrust laws.[33] Rather, as we understand it,

---

[29]APCO Brief, 5-13.

[30]In applicant's words: "Applicant will demonstrate that state and federal regulation to a substantial degree control all aspects of Applicant's growth and development, its marketing practices, its operations, and its wholesale and retail rates. The existence of this regulation negates the inference of the Board that Applicant possesses either the power to control prices or exclude competitors." *Id.* at 2. According to the applicant, the activities which are regulated include: rates and charges, finance, entry into service area, withdrawal from service and abandonment of facilities, acquisition, merger and consolidation, system extensions, transmission and interconnections, coordination reliability and quantity of service, arrangements with service organization and suppliers, accounting, and competition. *Id.* at 5-13.

[31]560 F.2d, 1314, 1321 (1977), *cert. denied*, 436 U.S. 922 (1978).

[32]428 U.S. 579, 596 n. 35 (1976).

[33]At oral argument before us, applicant's counsel was asked whether the applicant's assertion that the Alabama Public Service Commission considered anticompetitive matters in dealing with matters before it insulated the applicant from antitrust liability. Mr. Balch, applicant's counsel, answered as follows:

> "I don't believe we are contending that Applicant is immune from anti-trust liability. If the board has the impression that we are considering that, I would like to state here and now we are not contending that."

App. Tr. 21-22. ["App. Tr." refers to the transcript of the oral argument held before us on March 8, 1979; "Tr." refers to the transcript below.]

the applicant is relying upon a facially different argument: that it cannot be found to possess monopoly power. In the words of its counsel:

> I am suggesting that if there is a federal agency or a state agency which has the ultimate control over prices, that Alabama Power Company cannot, as a matter of definition, have the power to control its prices.[34]

This formulation of applicant's argument does not aid its case. In *Midland*, we were confronted with essentially the same argument and found ourselves compelled to reject it. The applicant for a nuclear power license there, like the applicant here, was seeking to avoid antitrust scrutiny of its activities. One of the bases on which it attempted to do so was the regulation to which some of its activities were subjected under the Federal Power Act. Rather than claiming immunity from the antitrust laws because of this regulation, it had argued that because the Federal Power Commission[35] might order it to interconnect with other utilities, the company *ipso facto* lacked monopoly power. To that we responded.

> We fail to perceive how a regulatory scheme that admittedly grants no immunity from the antitrust laws, by its mere existence, alters the character of what is otherwise monopoly power. Consumers' argument is an attempt to slip in via the back door a proposition the courts have barred at the front, namely, that regulation for other purposes can attenuate the antitrust laws. That argument has been rejected. *Mt. Hood Stages, Inc.* v. *Greyhound Corp.* 555 F.2d 687, 691-92 (9th Cir. 1977); *International T. & T Corp.* v. *General T. & E. Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975), and cases cited. The best that can be said for it is that "the impact of regulation must be assessed simply as another fact of market life." *Id.* at 936.

6 NRC at 1008.[36]

We know of no reason why that same response is not dispositive of the applicant's "pervasive regulation" argument here.[37] To be sure, the

---

[34]App. Tr. 34.

[35]Now the Federal Energy Regulatory Commission (FERC).

[36]Moreover, as noted in the margin of our *Midland* decision, "it is settled that even conduct formally approved by a regulatory agency may be the basis of an antitrust violation where agency approval conveys no exemption from the antitrust laws. *United States* v. *Radio Corp. of America, supra,* 358 U.S. at 350-51; *Cantor* v. *Detroit Edison Co., supra,* 428 U.S. at 596-98; *California* v. *FPC,* 369 U.S. 482, 489 (1967); *United States* v. *Philadelphia Bank, supra,* 374 U.S. at 350-52; *Litton Systems, Inc.* v. *Southwestern Bell Tel. Co.,* 539 F.2d 418, 422-24 (5th Cir. 1976); *City of Mishawaka* v. *Indiana and Michigan Electric Co., supra; Almeda Mall, Inc.* v. *Houston Power and Light Co., supra,* Trade Reg. Rep. par. 61,485 (S.D. Tex. 1977)." 6 NRC at 1008 fn. 447.

[37]In conjunction with its "pervasive regulation" argument, the applicant stresses that "the

argument in *Midland* was made in terms of the Federal Power Commission, while the asserted justification here is the increased restriction on the activities of applicant as a result of both state and federal regulation. But we see no significant difference in the two situations. What the argument boils down to in either case is that government regulation somehow serves to relieve the activities from close scrutiny under the antitrust laws. The law on this point is well-settled against the applicant's position. As *Midland* makes clear, the applicant's claim of the impact "pervasive regulation" has on its activities is simply another factor which must be assessed in examining applicant's activities for conformance to the antitrust laws.[38]

B. Scope of Inquiry

We turn now to the applicant's second broad argument against granting any antitrust relief. Specifically, it would have us set aside the Licensing Board's findings of liability — which formed the basis for that Board's remedial action — as founded upon a number of critical errors. Applicant's point seems to be that the Board roamed so far afield and delved so deeply in conducting its inquiry into applicant's activities that it went beyond the permissible reaches of Section 105c of the Act. According to this argument, the Act allows inquiry only into activities likely to occur in the period after the license is issued and not (as was done here) into the applicant's past activities.

The applicant argues that a rule barring consideration of past activities is compelled by the narrow scope of Section 105c inquiry intended by the Joint Committee on Atomic Energy. Alluding to the Joint Committee's statement that the licensing process should be used to "nip in the bud any

---

electric utility industry, in its historical development, has been recognized as a natural monopoly." APCO Brief, 19. Without ruling on the validity of the applicant's statement, we fail to see how a natural monopoly status aids the applicant's central argument that it cannot be found to possess monopoly power because the power to set prices or exclude competitors lies elsewhere, in the state and federal regulatory agencies. By definition, a natural monopolist has the power to exercise requisite control over prices or potential competitors. If anything, the applicant's argument on this score is self-defeating.

[38] *Accord, Davis-Besse, supra,* ALAB-560, 10 NRC at 282-86.

Brief mention should be made here of the Public Utility Regulatory Policies Act of 1978 (PURPA) (Pub. L. No. 95-617, 92 Stat. 3117). Counsel for applicant sought to inject PURPA into the proceeding at the oral argument before us (App. Tr. 242-45, 256); we declined to consider the Act at that time but invited applicant to submit a written memorandum on its importance to the case. Applicant sent us a memorandum on March 16, 1979; all the other parties submitted responses. According to the applicant, the existence of PURPA should have a "substantial impact on this Board's deliberations," including our decision on the existence of monopoly power. APCO Memorandum, 4. We think otherwise. We have carefully reviewed all the submitted materials; we are in complete agreement with the basic position of the applicant's opponents on this point. Nothing in PURPA causes us to change our findings on monopoly power, applicant's past conduct, or the appropriate remedies in this case.

incipient antitrust situation," the applicant contends that this "clearly focuses on future, not past, activities."[39] In this same vein, the applicant intimates that this is what the Joint Committee intended when it "made it clear that the standard it was expecting a board to apply was that 'it is *reasonably probable* that the activities *under the license* would, *when the license is issued or thereafter,* be inconsistent with any of the antitrust laws or the policy clearly underlying these laws.' " (Emphasis supplied by the applicant.)[40]

In our judgment, the applicant has misapprehended the thrust of the Joint Committee's statements. It derives from them an intent which does not give consideration to the statements in their entirety; nor does it give recognition to the words of the statute to which the statements relate. Properly considered, the statute could not reasonably support the position the applicant advocates.

As already seen, Section 105c requires the Commission, in conjunction with its review of a license application for a nuclear power plant, to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws." It is significant that Section 105c is concerned with both a situation which would be *created* when the license issued and a situation which would be *maintained* by the license issuance. Although this latter finding does require an assessment of the future, it equally clearly requires a review of the situation which preceded the license. In other words, as we held in *Wolf Creek,*[41] a determination of the antitrust effects of granting a license can be made only after the situation leading up to the grant has been ascertained.

Read with these words and meaning of Section 105c in mind, the statements of the Joint Committee take on a far different hue than that painted by the applicant. The Joint Committee's statement that the licensing process should be used to "nip in the bud any incipient antitrust situation" can thus be seen as a endeavor to explain Section 105c's injunction against the use of a nuclear license to "create" a situation inconsistent with the antitrust laws, and not, as the applicant insists, as a limitation on the scope and level of antitrust inquiry.[42] Similarly, the Joint Committee's statement that a "reasonably probable" standard shall apply in making the antitrust determination called for by Section 105c, deals with

---

[39]APCO Brief, 44.

[40]*Ibid.*

[41]*Kansas Gas and Electric Co. et al.* (Wolf Creek Station Unit No. 1), ALAB-279, 1 NRC 559, 567 (1975).

[42]*Id.*, 1 NRC at 572-73.

the degree of probability which governs that determination.[43] Neither the Joint Committee's words nor any reasonable inferences from their context fairly support the applicant's suggestion that there exists a ban against looking other than forward at the applicant's projected activities under the license. Indeed, both the statute and the Joint Committee's statements strongly suggest otherwise. As we recognized in *Wolf Creek*, their requirement of Commission assessment of the antitrust implications of future activities of the applicant cannot be made *in vacuo*.[44] Here, as elsewhere, the past is prologue. Past conduct, good or bad, often indicates what future conduct might be. This was recognized by no less than the Supreme Court when it warned that "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."[45] This indicates that a meaningful assessment of the issue before us — *i.e.*, whether issuance of a license for construction and operation of a nuclear power plant would create or *maintain* a situation inconsistent with the antitrust laws — cannot be made without first considering the current and past activities of the license applicant. We have little hesitance in construing Section 105c as permitting inquiry into the past activities of the applicant; indeed, the statute and Commission decisions require it. *Wolf Creek, supra*, 1 NRC at 573 and authorities there cited.

C. Standard for Finding of Liability

Applicant's third broad argument concerns the standard utilized by the Licensing Board in arriving at its finding on monopolization. As we understand its position, the applicant seems to advance three grounds for faulting the way in which the Board reached its findings. First, it says that "the Board concluded that it need not find a violation of the antitrust laws, but could be satisfied with a showing of 'anticompetitive' conduct which need not have been bottomed on a specific violation.' "[46] It next states that the Board considered not only "anticompetitive" conduct but conduct which "tended" to be anticompetitive.[47] It then argues that in proceeding on these premises the Board failed to base its conclusions on the antitrust laws.[48] In short, the applicant seems to be arguing that (assuming it is wrong in its position that consideration of past activities is barred) under Section 105c all that is cognizable are actual violations of the antitrust laws.

---

[43] *Midland, supra*, 6 NRC at 927 (quoting the Joint Committee Report); *Wolf Creek, supra*, 1 NRC at 569-70.
[44] *Wolf Creek, supra*, 1 NRC at 572-73.
[45] *United States* v. *Swift & Co.*, 286 U.S. 106, 116 (1932) (Cardozo, J.).
[46] APCO Brief, 44.
[47] *Ibid.*
[48] *Id.* at 47.

As we understand applicant's argument, it believes this standard was contemplated when "the Joint Committee made it clear that the standard it was expecting a board to apply was that 'it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policy clearly underlying these laws.' "[49]

We find this argument without merit. In *Midland,* we addressed the question, *inter alia,* of whether finding a "situation inconsistent with the antitrust laws" necessarily depended upon a finding of actual violations of those laws.[50] We there ruled that Section 105c was not restricted to actual violations:

> The Licensing Board was correct in holding that proof of an actual violation of the antitrust laws is not required to show the existence of a situation "inconsistent with" them for Section 105c purposes. The Congressional framers of the section (the members of the Joint Congressional Committee on Atomic Energy) were originally divided between those who favored proof of an antitrust violation before allowing Section 105c remedies to be imposed and those who thought a showing of circumstances merely "tending" to such a violation should suffice to allow that relief. An accommodation between the two views was eventually reached. The members of the Joint Committee agreed that proof of conditions which ran counter to the *policies* (underlying those laws, even where no actual violation of statute was made out, would warrant remedial license conditions under Section 105c. We need not linger over the matter; this compromise is expressly manifested in the report of the Joint Committee and is reflected in the Commission's decisions.[51]

These observations apply to applicant's argument here as well. In this respect, we find no evidence to support applicant's charge that the Licensing Board considered conduct which "tended to be anticompetitive" in making its five findings of monopolization. Our analysis of the Licensing Board's decision reveals that each of its findings of monopolization was made on the basis that the acts in question were "anticompetitive."

Finally, we turn again to *Midland* for the answer to the applicant's argument that the Licensing Board erroneously based its findings on mere anticompetitive conduct. The Licensing Board there had reasoned that a "situation inconsistent with the antitrust laws" within the meaning of

---

[49] *Id.* at 44 (emphasis deleted).
[50] See 6 NRC at 907-14
[51] *Id.*, 6 NRC at 908-09 (footnotes omitted). *Accord, Wolf Creek, supra,* 1 NRC at 570.

Section 105c amounts to "anticompetitive conduct." The Department of Justice criticized that analysis, claiming that a focus solely upon conduct without consideration of market structure would ignore essential elements in such a situation. We rejected the Department's argument:

> We do not agree that the Licensing Board's determination to concentrate on the applicant's conduct necessarily caused it to go astray in the manner suggested by the Department. What an inquiry is labelled is of lesser moment than how it is carried out. In our judgment, evaluation of business "conduct" in a case like this one, exploring charges essentially bottomed on Section 2 of the Sherman Act and its underlying policies, requires the application of the same monopolization and policy concepts as an investigation of an anticompetitive "situation." This is so because, as with other statutes, actions permissible under the antitrust laws in one situation may be proscribed in another. An antitrust analysis of an applicant's conduct must therefore be undertaken in the context of the "situation" in which that conduct occurred — in other words, against the background structure of the relevant market. Of course that analysis of a utility's conduct must (among other things) be sensitive to judicial and FTC antitrust rulings that the actions of a dominant business enterprise have to be tested against a more stringent standard than applies to actions of smaller concerns in highly competitive markets, and must also take account of the general rule that electric utilities are not exempt from the Federal antitrust laws, particularly where they voluntarily enter into commercial relationships governed in the first instance by business judgment and not regulatory coercion.[52]

This analysis is dispositive of applicant's argument here. We hold that, in applying Section 105c to the instant case, the Licensing Board did not err in the manner suggested by the applicant; our own antitrust scrutiny must go forward.

III.

RELEVANT MARKETS

At the outset, we endorse — over the applicant's objection — that portion of the Licensing Board's analysis which led it to conclude that the market for wholesale power in the applicant's service area was a relevant

[52] *Id.* 6 NRC at 912-13 (footnotes omitted).

market for the purposes of this proceeding. For the reasons which follow, however, we disagree with that Board's holding that there are no other relevant markets. As we explain, there are relevant markets both for coordination services and retail power; the geographic bounds of both markets also correspond to the applicant's service area.

A. Coordination Services Market

1. **The Product Market.** In the electric utility business, there is a common practice among the companies of interchanging power and energy and sharing responsibility for building new generating facilities to achieve economic benefits unattainable by an individual utility acting alone. Generally known as "coordination," the practice includes various arrangements among utilities for reserve sharing, emergency exchange of power and energy, economy exchange of power and energy, maintenance scheduling, seasonal capacity exchange, and staggered construction. The simple purpose of these arrangements is to allow producers of firm power[53] to lower their costs of production.

In the proceeding below, Justice, AEC and MEUA claimed that the sale or exchange of such power and energy and associated services comprised a relevant market for antitrust purposes — namely, a "coordination services" market separate from the wholesale and retail power markets.[54] Although taking a somewhat different position, the staff also claimed that there was a market for such services.[55] Not surprisingly, the applicant denied the existence of such a market.[56]

The Licensing Board rejected the proffered coordination services market on the ground that it "clearly would include a variety of factors that in no way could be close substitutes for one another." 5 NRC at 886. Although

---

[53]We defined firm power in *Midland* as "essentially a utility commitment to supply electric energy to a customer on demand for as long as needed. One contracting for firm power (whether at retail or wholesale) is buying not merely energy, but assurance that (barring some extraordinary unforeseen circumstance) the utility will make that power available without interruption when called for." 6 NRC at 950.

[54]Justice and MEUA referred to it as a "regional power exchange" market. Justice Prehearing Brief Below, 55-58; MEUA Prehearing Brief Below, 28-31. AEC denominated it as the "bulk power supply services market." AEC Prehearing Brief Below, 24. We first adopted use of the term "coordination services" market in our *Midland* decision. We use that term here as we think it best describes the practice which makes up that market. For a detailed discussion of the factors which make up the coordination services market, see *Midland*, 6 NRC at 902-03, 949-77.

[55]The staff's original position was that the elements of the coordination services market combined with the market for firm wholesale power to form a single bulk power services market. Staff Prehearing Brief Below, 52-54. However, it no longer adheres to this position. In view of our *Midland* decision, the staff now concedes that a separate market for coordination services exists. Staff Reply Brief, 43-44.

[56]See APCO Proposed Findings, 447-57.

the Licensing Board expressly recognized that in some cases a number of diverse services could be clustered and treated as a single market (citing *United States* v. *Philadelphia National Bank*,[57] it apparently thought that *United States* v. *Grinnell Corporation*[58] precluded that treatment here. Interpreting *Grinnell* as requiring the factors making up the proffered market to be "reasonably interchangeable" with each other, the Board found that they were "not usually close substitutes for one another" and, hence, "not in the same market." *Id.* at 887.

On appeal, the parties essentially adhere to their original positions. The applicant supports the Licensing Board's decision, its principal post-*Midland* argument being that the existence of a coordination services market in the area involved here lacks evidentiary support.[59] The other parties oppose the conclusion reached by the Licensing Board.[60] Their argument basically is that not only is there evidence indicating the existence of such a market, but that a finding to that effect is required by *Midland* and applicable judicial decisions. We agree with this position.

a. Because the Licensing Board decision turned on what it considered to be the teaching of *Grinnell,* we begin our analysis with a detailed review of that case. *Grinnell* involved the question of whether the defendant company had monopolized the market for accredited central station service[61] in violation of Section 2 of the Sherman Act. The District Court had treated the entire accredited central station service business as a single market.[62] The company argued, however, that the individual central

---

[57]374 U.S. 321 (1963).

[58]384 U.S. 563 (1966).

[59]APCO Reply Brief, 23-38.

[60]Justice Brief, 135-149; Justice Reply Brief, 14-20; Staff Brief, 10-20; Staff Reply Brief, 42-44; AEC Brief, 83; AEC Reply Brief, 11-13; MEUA Brief, 41-46.

[61]Central station service, simply put, protects premises by installing thereon fire or burglary (or both) detection devices which automatically transmit an electric signal to a central station which is manned 24 hours a day. Upon receipt of a signal, the central station, where appropriate, dispatches guards to the protected premises and notifies the police or fire department directly. An accredited central station service is one which has been approved by insurance underwriters. 384 U.S. at 566-67.

[62]Among the various central station services offered were the following:

(1) automatic burglar alarms;
(2) automatic fire alarms;
(3) sprinkler supervisory service (any malfunctions in the fire sprinkler system — *e.g.,* changes in water pressure, dangerously low water temperatures, etc. — are reported to the central station); and
(4) watch signal service (night watchmen, by operating a key-triggered device on the protected premises, indicate to the central station that they are making their rounds and that all is well; the failure of a watchman to make his electrical report alerts the central station that something may be amiss).

station services are so diverse that, under *du Pont*,[63] they cannot be lumped together to make up the relevant market.

In upholding the lower court's decision, the Supreme Court declared:

> But there is here a single use, *i.e.*, the protection of property, through a central station that receives signals. It is that service, accredited, that is unique and that competes with all the other forms of property protection. We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities. To repeat, there is here a single basic service — the protection of property through use of a central service station — that must be compared with all other forms of property protection.

384 U.S. at 572.

The Court went on to say:

> Burglar alarm service is in a sense different from fire alarm service; from waterflow alarms; and so on. But it would be unrealistic on this record to break down the market into the various kinds of central station protective services that are available. Central station companies recognize that to compete effectively, they must offer all or nearly all types of service. * * * We held in *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 356, that "the cluster of services denoted by the term 'commercial banking' is a distinct line of commerce." There is, in our view a comparable cluster of services here.

Then, specifically addressing *du Pont*, the Court explained:

> There are, to be sure, substitutes for the accredited central station service. But none of them appears to operate on the same level as the central station service so as to meet the interchangeability test of the *du Pont* case. Non-automatic and automatic local alarm systems appear on this record to have marked differences, not the low degree of differentiation required of substitute services as well as substitute articles.

Id. at 572-73.

The Supreme Court in *Grinnell* did not, as the Licensing Board apparently thought, lay down a rule that a market could never be

---

Id. at 566 n.4.

[63] *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (the cellophane case).

comprised of products and services which were not interchangeable with each other. For, in holding that the combination of services comprising the central station service constituted a relevant market, the Court expressly indicated that it was following the course it had adopted in *Philadelphia National Bank*. In that case, the Court found that the cluster of clearly diverse products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking"[64] comprised a product market "sufficiently inclusive to be meaningful in terms of trade realities." 374 U.S. at 356-57.

To be sure, the Court in *Grinnell* did take note of its ruling in *du Pont* that products and services which consumers may reasonably interchange for the same purposes make up a relevant market. But in *Grinnell,* the "interchangeability" with which the Court was concerned related to whether there were in the market place available alternatives to overall central station service itself; the Licensing Board's application of the "interchangeability" test here would indicate a contrary belief that the individual products and services making up the central station service had to be interchangeable with each other. In other words, the fact that central station service was made up of various products and services which were not interchangeable did not prevent the Court from holding the central service itself to be a relevant market. In this respect, the Court's action was not novel. It did no more than follow an avenue it had opened up in *Philadelphia National Bank* some three years earlier.[65]

b. Owing to the erroneous view it took of *Grinnell,* the Board below rejected the proffered coordination services market on grounds we cannot uphold. We must then take the next step and ascertain for ourselves whether such a market exists in terms of "commercial or trade realities" and, if so, what that market's dimensions are. Fortunately, that work has been made easier by our prior decision in *Midland.* Notwithstanding the

---

[64]More specific examples of banking "products" identified by the Court were: unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, revolving credit funds. Examples of banking services included: acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety deposit boxes; account reconciliation services; foreign department services (acceptances and letters of credit); correspondent services; and investment advice. 374 U.S. at 326 n.5.

[65]For other cases holding that a bundle of products and services can constitute a relevant market, see *United States* v. *Connecticut National Bank*, 418 U.S. 656 (1974); *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *Credit Bureau Reports, Inc.* v. *Retail Credit Co.*, 358 F. Supp. 780 (S.D. Texas 1971), *aff'd* 476 F.2d 989 (5th Cir. 1973).

fact that *Midland* involved other utilities in a different part of the country, we find its teachings useful here for the reason expressed by the Licensing Board based on its analysis of the evidence in this case:

> The principles of electric power supply production and coordination are generally applicable throughout the electric utility industry (Mayben, Direct, pp. 3-9). These principles do not vary significantly among electric utilities regardless of differences in locations, although they may change to a certain extent depending on corporate policy and financial requirements (Mayben, Direct pp. 8-9; Tr. 5,576-5,586; *FPC National Power Survey*, Part I, Chapter 17 "Coordination for Reliability and Economy," December 1971).

5 NRC at 834.

In *Midland*, we traced in painstaking detail the operations of the electric utility industry.[66] We discussed the manner in which utilities interact with each other in planning for and constructing the necessary transmission and distribution facilities and in operating them. We explained how, because of the peculiar characteristics of electricity, utilities buy, sell and exchange surplus bulk power and associated services to improve the efficiency and reliability of their operations. For reasons there discussed, we concluded that there existed a separate coordination services market consisting of these types of transactions. We stated:

> [C]oordination arrangements usually comprise several differing types of surplus power transactions and associated services . . . . [T]hese various power transactions are not reasonably interchangeable with wholesale power. But neither are they necessarily interchangeable with one another. All, however, serve an essentially similar function. That function is facilitating production of firm bulk power at lower cost and with greater reliability by making profitable use of otherwise surplus generating capacity. These arrangements constitute a "bundle of services" which merits recognition as a distinct market similar to the way various services offered by commercial banks fall in one and the same product market. *United States* v. *Philadelphia National Bank, supra*, 374 U.S. at 356.

6 NRC at 975.

We know of no compelling reason for reaching a different conclusion here. As will be seen, the evidence in this proceeding reveals that the same

[66] See 6 NRC at 949-74.

kinds of transactions found to occur in Michigan take place in Alabama as well.[67]

The Southern Company Power Pool Intercompany Interchange Contract (D.J. 3009),[68] to which applicant is a party, provides the contractual framework within which the members of the Pool engage in coordination services transactions. Although not every type of service available under the agreement is specifically identified, the terms of the agreement, viewed in light of the manner in which the utility industry generally operates, leave little room to doubt that the various coordination services activities are actively pursued by the utilities involved.

For proof of the validity of this observation, we need but cite applicant's own admission contained in the power pool agreement:

* * *

> WHEREAS, each of the POWER COMPANIES and their respective customers achieve substantial economies *through the common planning, development, and coordination of their operations which they have successfully practiced for many years, and*
>
> WHEREAS, such common planning, development, and coordination provides certain advantages to POWER COMPANIES and their respective customers including:
>
> (a) The staggering of the construction of new generating facilities so that each of the respective POWER COMPANIES can construct and install for their respective territorial loads the optimum size generating facilities which produce maximum economies of scale;
>
> (b) An opportunity for each of the respective POWER COMPANIES to dispose of surplus energy and capacity that may be available from time to time due to the staggered construction of generating units, seasonal variations in demands for electric power, and variations in patterns of the diversity of loads imposed from time to time on the respective POWER COMPANIES;
>
> (c) An opportunity to utilize the seasonal and diversity patterns of other utilities not contiguous to each of the respective POWER COMPANIES for the outlet of surplus capacity and energy which may

[67]We found in our *Davis-Besse* decision a similar market to exist in the territories served by the utilities there involved. 10 NRC at 287, 301-02.

[68]In referring to the exhibits and testimony submitted below, we have followed the system of notation used by the Licensing Board. See 5 NRC at 820 n.4.

be available from time to time, together with the opportunity, because of such variation in seasons and diversity of loads, to acquire from other utilities energy at a low cost and thus avoid or defer the construction of generating capacity to meet seasonal loads;

(d) The opportunity to pool reserves thus reducing the magnitude of reserve capacity required by the respective POWER COMPANIES in order to assure reliable service to their respective customers and

(e) Improvements in the reliability of electric service through the use of transmission interconnections which provide the respective POWER COMPANIES with the opportunity to call upon one another as well as other utilities with which they, or any of them, are interconnected to provide backup service in case of emergencies or breakdowns in excess of the reserves carried by the respective POWER COMPANY;

* * *

D.J. 3009, pp. 2-3 (emphasis supplied).

Other evidence confirms that the applicant engages in various "coordination services" transactions. It participates in joint ownership arrangements as, for example, with the Georgia Power Co. over the Gaston coal-fired generating plant (D.J. 1002); it shares reserves with the other companies in the Southern Pool (D.J. 603, 604, 605, and 3009); it engages in short-term capacity exchanges with neighboring utilities (Mississippi Power and Light, D.J. 3002; Duke Power Co., D.J. 3003; South Carolina Electric & Gas Co., D.J. 3004; Tennessee Valley Authority, D.J. 3007; and Florida Power Corporation, D.J. 3008); it participates in seasonal capacity exchanges with TVA and with the Florida Power Corporation (D.J. 3007, 3008, 3009, 603, 604, and 605); and it exchanges emergency, maintenance and economy energy with other utilities (D.J. 3002, 3003, 3004, 3007, 3008, 3009, 603, 604, and 605).

Even without our *Midland* decision as precedent, we would reach the same conclusion here. As we have emphasized, court decisions teach that, for antitrust analysis purposes, a relevant market must reflect commercial or trade realities.[69] Guided by that rule, our review of the record in this proceeding persuades us that there exists a coordination services market

[69]See, *e.g.*, *Phillipsburg National Bank*, *supra*, 399 U.S. at 360; *Grinnell*, *supra*, 384 U.S. at 571-76; *Philadelphia National Bank*, *supra*, 374 U.S. at 356-57.

comprised of the types of transactions for the sale and exchange of power and energy and associated services discussed above.[70]

c. The applicant does not disagree with the applicability of the "trade realities" rule to the matter at hand. Indeed, it specifically endorses that rule's controlling effect here.[71] It does, however, dispute the conclusion advocated by its opponents. Its position essentially is that, whatever may be said of the electric utility industry generally, the evidence in this record simply is insufficient to show a coordination services market exists in the area of interest here.[72]

To support this position, the applicant challenges the testimony of Mr. Mayben and Dr. Wein, Justice's two principal witnesses. At the core of its attack is the proposition that these witnesses possess no factual knowledge of the operations of the utilities in Alabama (beyond the terms of certain contracts and rate schedules furnished them) and that, consequently, their testimony lacks foundation and is entitled to no weight.[73]

We cannot accept applicant's position. To begin with, we disagree with its thesis regarding the state of the witnesses' factual knowledge of the operations of the utilities involved. Both Mr. Mayben and Dr. Wein have expertise in the utility field.[74] Beyond that, Mr. Mayben had studied not

---

[70]In *Midland*, we excluded from the coordination services market there involved "developmental coordination" — *i.e.*, the construction of power plants on a staggered basis or as joint ventures by two or more utilities with the intention of sharing the power generated by them — but included within that market the purchase and sale of "unit power" from such plants. 6 NRC at 976. Similarly, we do not include "developmental coordination" within the coordination services market held to exist here.

[71]In applicant's own words:

> "The touchstone of market analysis is identifying patterns of trade and commercial realities in a designated area."

APCO Reply Brief, 37.

[72]Applicant also advances another argument. Avowedly to show the "lack of commercial reality" of the coordination services market, the applicant explains in detail how it is part of an "integrated public utility system" with three other utilities which form the Southern Company, a holding company approved by the SEC; and how AEC gained by obtaining its deficit power and energy requirements from applicant rather than from the four-company power pool. APCO Reply Brief, 32-37; see also App. Tr. 79-92. Far from showing a lack of commercial reality, the fact that AEC and the applicant engage in such arrangements and that AEC finds it economical to do so indicates the very opposite — that there is a market for bulk power to meet deficit requirements.

[73]APCO Reply Brief, 23-38.

[74]Mr. Mayben is a professional engineer registered in some thirteen states. Since 1965, he has been a partner and supervising executive engineer with R. W. Beck and Associates involved in providing consultant engineering services to various utilities. His work experience has included the design of power generating stations, high-voltage transmission lines and substations; and power supply planning with particular concern with power pooling and coordinated supply. He has served as the principal Systems Engineer to the Missouri Basin Systems Group (MBSG), a power planning and power pooling organization, whose electric utility members

only the terms of the power pool and other agreements entered into by the utilities in Alabama and in the neighboring areas, but the rate schedules on file with the Federal Power Commission (now Federal Energy Regulatory Commission); in addition, and perhaps most important, he had analyzed the pool operating minutes — which detail the actual transactions that take place.[75] Dr. Wein, in turn, based his testimony on the existence of a

---

have generation and transmission facilities covering a multi-state area in the Upper Missouri River Basin. Since 1967, he has also worked extensively in the development and implementation of an ongoing bulk power supply program for the Nebraska Public Power District, a utility which has the bulk power responsibility for a major portion of the State of Nebraska. Mayben, Direct, 1-5.

Dr. Wein's background is equally impressive. He is a professor at the Graduate School of Business Administration at Michigan State University, a position he has held since 1959. From 1961 through 1963 he was on leave while serving as Chief Economist and Head of the Office of Economics of the Federal Power Commission (now Federal Energy Regulatory Commission). Thereafter, he, along with others, established the Institute of Public Utilities at Michigan State University in 1965. Before becoming a professor at Michigan, he was Associate Professor of Economics and Industrial Administration at the Carnegie Institute of Technology, a consulting economist for industry, principal economist of the Antitrust Division of the Justice Department (where he also served as special advisor to the Attorney General on antitrust problems in the steel industry), principal economist in the Office of Price Administration, a senior statistician with the Army Air Forces, a principal economist in the War Production Board and a junior economist in the U.S. Commerce Department. He holds a masters degree in economics from Columbia University and a Ph.D. in economics from the University of Pittsburgh. Wein, Direct, 1-16.

[75]On cross-examination, Mr. Mayben explained the basis for his knowledge of the operations of APCO in the following manner:

> Q. Mr. Mayben, am I correct in my understanding that the knowledge which you have of such portion of the so-called regional power exchange market denominated by you is based upon transactions reflected in certain rate schedules on file with the Federal Power Commission which were furnished to you by the Department of Justice?
>
> A. Yes, that information was used in my preparation of this proposed Exhibit 101.
>
> Q. Does your knowledge of such portion of the regional exchange market come from any other source of information which you can specify?
>
> A. Yes. It comes from my experience in working with clients who are engaged in regional exchange activities and my ability to interpret contracts as to the types of transactions which customarily occur under interconnection agreements which have interchange type service schedules to them.
>
> Q. Other than this general knowledge, Mr. Mayben, is there any other source for the particular regional power exchange market which you assert here?
>
> A. Well, of course, I did examine the pool Operating Committee Minutes, and information there led me to believe that in fact there were transactions taking place pursuant to the contracts that the Department of Justice provided to me.

Tr. 1721-22.

coordination services market in large part on what he learned from Mr. Mayben concerning the manner in which utilities operated.[76] Considering

[76]Dr. Wein explained the basis for his testimony as follows:

> MR. MILLER: Just a minute. Your were asked about Mr. Mayben.
>
> THE WITNESS: That's right. I asked him then whether the structure of the industry — of course I know some of that myself, but I wanted to get his view, as to whether wholesale power was a reasonable type of transaction, one which occurs in Alabama, and of course I asked about the [*Midland*] case, because we were both associated there, too.
>
> Yes. He thought that there are wholesale transactions and he described the kinds of conditions under which wholesale transactions take place.
>
> Of course, there was a question of retail, where does wholesale leave off and retail begin. That sort of thing. That's the sort of thing I asked Mr. Mayben to do.
>
> In the [*Midland*] case, I asked him to do another.
>
> MR. MILLER: I don't think you were asked about that.
>
> THE WITNESS: I'm sorry. I sort of mix these things up.
>
> BY MR. BALCH:
>
> Q. Did you ask Mr. Mayben to undertake this analysis or investigation without any further delineation or instructions?
>
> A. Which analysis and investigation?
>
> Q. You said you asked him to find out what kind of transactions take place.
>
> A. He didn't have to make any analysis or investigations. He knew. He just told me and explained to me what they meant. Then I read up about it.
>
> CHAIRMAN GLASER: Well, did he tell you what the source of his knowledge was?
>
> THE WITNESS: Well, he said the source of his knowledge was, he was an engineer, had negotiated many contracts and he knows the business. I didn't know beyond that.
>
> BY MR. BALCH:
>
> Q. Did you assume that the same kind of transactions would take place in the southeast as have taken place perhaps in the northeast or the Missouri Basin?
>
> A. All I asked him were the kinds of things that would take place in a power pool. Then I asked him, did it make much difference whether it would be in Alabama or any other place and he said, the importance might change. Some might have more sorts of transactions. Some might have less sorts of transactions. But in effect, the transactions, all could be classified under very common classification.
>
> Q. Did he choose the transactions from which his analysis would be made, or did you choose the transactions from which the analysis would be made?

the universality of these utility practices, confirmed by the Board below and by us in *Midland*,[77] we find no merit to the applicant's position that the testimony of Mr. Mayben and Dr. Wein lacks factual foundation.

An even more compelling reason requires rejection of applicant's argument. Although expressed in terms of a failure of the other side's proof, the unstated premise underlying the argument is that applicant in fact does not engage in the kind of coordination activities to which Mr. Mayben and Dr. Wein testified. The critical failing of this premise is that it runs directly counter to the very words subscribed to by the applicant and the other parties to the Southern Company power pool agreement — an agreement which has continued in effect for some 30 years.[78] In that agreement, the signatories not only specifically admitted to having "successfully practiced for many years . . . common planning, development, and coordination of their operations," but also to a desire to "continu[e] . . . coordinated operation."[79] Applicant would now have us disregard those words as no more than wasted ink. This we cannot do.

To sum up, we are satisfied from our review of the record that, for purposes of this proceeding, a coordination services market exists in the general area of applicant's operation. We need only to determine its geographic dimensions to complete our analysis of that market. We turn now to that task.

2. **The Geographic Market.** In the proceeding below, Justice took the position that a coordination services market "by its very nature does not lend itself to precise geographic market definition. Electric utilities with access to this market range far and wide in search of useful power exchange transactions; they are not restricted to specific geographic limits or certain identified utilities with whom they may deal."[80] For these reasons, Justice maintained that precise definition of the geographic boundaries of this entire market is not necessary to a consideration of monopolization charges; it suffices to focus attention on a separate economic entity or submarket within the broader market.[81]

In *Midland*, Justice took a similar position. On that occasion, we said:

A. I think we sort of jointly agreed on what the transactions were.

Tr. 13,358-60.

[77]See 5 NRC at 833-37 (*Farley* below); 6 NRC at 1066-67 (*Midland*); see also pp. 1050-1051, *supra*.

[78]The power pool agreement bears an original date of October 16, 1950. This gives an indication of the extended period during which applicant has been involved in coordination activities. See D.J. 3009.

[79]*Id.* at pp. 2-4.

[80]Justice Prehearing Brief Below, 57.

[81]*Id.* at 58.

> We agree with Justice's legal position. Where a discrete submarket exists within an overall geographic market, monopolization of the submarket is itself an antitrust violation. *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 336-37; *Case-Swayne Co.* v. *Sunkist Growers, Inc., supra,* 360 F.2d at 455-59; *In re Luria Brothers and Co., supra,* 62 FTC at 612-14. A submarket must correspond to commercial realities and be economically significant, *Brown Shoe, supra,* and its existence is a question of fact that must be "charted by a careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for suppliers." *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 359.

6 NRC at 977.

Those same observations guide us here. The record in this proceeding discloses that the applicant engages in exchanges of power directly or through other Southern Pool members with surrounding electric utilities, including Mississippi Power & Light Co., Florida Power Corp., Duke Power Co., South Carolina Electric & Gas Co., and TVA (Mayben, Direct, 54-55; D.J. 101, 3002, 3003, 3004, 3007, 3008; Wein, Direct, 62-64). Thus, at first impression there might seem to be support for a finding of a broad geographic market encompassing the areas in which these utilities operate.

But we need not pause to look for a precise definition of the geographic boundaries of such an overall market. For that is not the market relevant to our inquiry. For purposes of this proceeding, we must focus on that market area, within the overall market, to which the smaller utilities in Alabama can practically turn for suppliers.

The record in this proceeding discloses that the area within which AEC and the other utilities comprising MEUA[82] may seek coordination services is limited to applicant's service territory and nearby environs — central and south Alabama. Applicant owns all transmission lines in the area over 115 kv and controls all transmission facilities to utilities outside that area. 5 NRC at 900-01; D.J. 1000; D.J. 1006; D.J. 1008; AEC X CRL-1A; St. John, Direct, 7, 39; Harris Tr. 25,455-59. As a result, it has the power to grant or deny access by AEC and the other utilities to the kind of coordination services engaged in by APCO. For these reasons, we conclude

[82]While MEUA might arguably be considered a participant (or potential participant) in the coordination services market, we think it worth repeating a point we made in *Midland*: for a utility without any generating capacity of its own, "[c]oordination power services are not useful to it and for its purposes are not functionally interchangeable with wholesale power. In short, given the nature of coordination power, [non-generators] literally cannot substitute coordination power for wholesale power as a long-term source of firm electric power." 6 NRC at 963. As the Board below noted, none of the members of MEUA owns or operates any generating facilities. 5 NRC at 827.

there exists, for purposes of our antitrust analysis, a *relevant* coordination services market in central and south Alabama, the area within which AEC and the other smaller utilities are confined for access to that market in terms of "commercial or trade realities."

B. Retail Market

In the proceeding below, Justice and both intervenors submitted that the retail market for firm power constituted a relevant market within which to examine applicant's conduct.[83] The product market was defined as the supply of firm power to the ultimate consumer;[84] the geographic market was seen as corresponding to central and southern Alabama, "the area where applicant sells or could reasonably compete to sell at retail."[85]

The Licensing Board agreed that "[r]etail firm power is clearly a distinct product market." 5 NRC at 887. Citing *Otter Tail Power Co.* v. *United States*,[86] the Board further found that the economic viability of retail distribution systems is worthy of antitrust protection. *Id.* at 889. It nevertheless rejected the proposed market. While conceding that some competition exists "in the interstices of the service areas of retail distribution systems," the Board found that the local distribution of retail power is a natural monopoly and that the rivalry among retail sellers is insufficient to bind all of central and south Alabama into one geographic market. *Id.* at 888. And, while it determined that the hundreds of individual local markets would have been proper subjects for examination, the Board saw no purpose in examining such "natural monopoly" situations for antitrust violations. The Board concluded: "Competition *between* retail distribution systems, if it is of only infra-marginal proportions, is presumably outside of the scope of antitrust remedy." *Id.* at 889 (emphasis in original).

The Board sought to bolster its conclusion by referring to *Otter Tail*. In that case, the Board wrote, "the focus [was] upon the retail distribution entity as a buyer (or potential buyer) in the wholesale power market." Every anticompetitive practice in the case was said to have taken place at the wholesale level. The relief decree "in every facet, affected retail distribution systems in their access to and role as buyers in the market for bulk wholesale power." This led the Board to write that there is a "market which

---

[83]The NRC staff argued below the relevance of only one market — that for "bulk power supply and bulk power supply services." Staff Proposed Findings, 27 (¶3.02). On appeal, the staff changed its position in light of our decision in *Midland*; it now maintains that separate markets exist for coordinated services and for wholesale power. Staff Reply Brief, 42-45; see also, fn. 55 *supra*. The staff made no mention of the retail market either below or on appeal.

[84]See, *e.g.*, Justice Proposed Findings, 62 (¶4.01).

[85]See, *e.g.*, Justice Proposed Findings, 65 (¶4.07).

[86]410 U.S. 366 (1973), *affirming in part and remanding in part*, 331 F. Supp. 54 (D. Minn. 1971).

is singularly relevant for the licensing of nuclear facilities to generate electricity: the market for wholesale power." *Id.* at 889-890.

Justice, AEC, and MEUA all excepted to the Board's rejection of the proffered retail market.[87] On appeal, they argue that the Board was factually incorrect when it failed to find sufficient competition at retail to justify grouping central and south Alabama into one geographic market. Moreover, they cite both *Otter Tail* and our decision in *Midland* as requiring reversal of the rejection below of the retail market.

1. **The Market in Otter Tail.** We begin our analysis by taking issue with the Licensing Board's interpretation of *Otter Tail.* As the Board stated, the violations in that case took place at the bulk power level; the remedies were applied at that level as well. But the *market* involved in the case was the retail market. It was this market that the defendant was attempting to monopolize; the remedies were designed to effectuate competition at the retail level, not the wholesale level. The district court's decision in *Otter Tail* puts any doubt about this to rest. See 331 F.Supp. 54, 58, 61 (D. Minn. 1971).

In the case now before us, applicant is allegedly attempting to monopolize (or has succeeded in monopolizing) three separate markets. It is further claimed that an unconditional license to operate the Farley facility assertedly will have anticompetitive effects on all three markets. In such a situation, we do not read *Otter Tail* as mandating that we restrict ourselves to an analysis of the wholesale market. To the contrary, we see that case as standing for the proposition that the markets relevant for analysis are all those in which anticompetitive effects may be felt.

2. **The Product Market.** Beyond its espousal of the view that the bulk-power market is the "singularly relevant" market in NRC antitrust actions,[88] the Licensing Board appeared to have one fundamental problem with the proposed retail market: it simply did not believe there was sufficient actual (or potential) competition at retail to justify antitrust analysis. The advocates of the market contend that the Board was factually incorrect in its assessment of the amount of competition at retail; they see the retail situation in Alabama as nearly identical with the situation we found in *Midland* to exist in Michigan.[89] Applicant, on the other hand, argues that the potential for retail competition in Michigan was far greater

---

[87]Justice Exceptions, pp. 2-3 (Exceptions 6 and 7); AEC Exceptions, pp. 2-3 (Exceptions 5 and 6); MEUA Exceptions, pp. 1-2 (Exceptions 4, 5 and 6).

[88]A view not shared by us in *Midland* (6 NRC at 949-97) and *Davis-Besse* (10 NRC at 270, 301-02); in both cases all three markets offered here were found relevant.

[89]Justice Brief, 148-49; Justice Reply Brief, 24-28; MEUA Brief, 6-17.

than in Alabama; it sees no inconsistency between the Licensing Board's decision and *Midland*.[90]

In assessing the extent of retail competition, it is important to consider the nature of the industry involved. Most retail consumers of electricity are locked into a particular supplier; the residents of Birmingham, for example, must currently look to applicant for their electric needs. As the Supreme Court said in *Otter Tail* (410 U.S. at 369): "[e]ach town . . . generally can accommodate only one distribution system, . . . making each town a natural monopoly market for the distribution and sale of electric power at retail." Clearly we are not dealing with a product that is susceptible to intense competition for every sale.

This is not to say that retail competition is either impossible or unprotected by the antitrust laws; *Otter Tail, Midland,* and *City of Mishawaka* v. *American Electric Power Co. (Mishawaka II)*[91] are cases that all hold otherwise. Although competition for individual users already taking electric service from a supplier may be unlikely to occur,[92] competition can take place for certain new loads or for the right to be sole distributor in a municipal area.[93] There can also be "yardstick competition";[94] the existence of a potential competitor may have an effect on the actions of another distributor.

In Alabama, franchise, individual load, and yardstick competition are all present to some degree. In terms of franchise competition, Alabama law prohibits utilities from serving within municipal corporate limits without the permission of the municipal government.[95] An examination of a list of applicant's franchises (prepared in 1973) reveals that applicant had 313

---

[90]APCO Reply Brief, 38-44.

[91]465 F. Supp. 1320 (N.D. Ind. 1979), *aff'd in part and remanded on other grounds,* 616 F.2d 976 (7th Cir. 1980), *cert. denied,* 449 U.S. 1096, 66 L.Ed. 2d 824 (1981).

[92]Although such competition is rare, we found in our *Davis-Besse* decision that street-to-street, head-to-head competition took place in a good part of the City of Cleveland. 10 NRC at 274. While there is less of it in Alabama, the Board below found such competition in the Town of Samson. 5 NRC at 888.

[93]The fact that local distribution may be a natural monopoly does not mean the identity of the monopolist cannot change. In *Otter Tail,* for example, the sole competition found by the Court was for the control of local distribution monopolies.

[94]"Yardstick competition" is a form of competition in which two sellers (in this case, distributors of retail power), not directly competing against each other for sales, have their pricing policies (and any other practices deemed relevant by purchasers) compared. As it relates to the retail distribution of electricity, a local distributor's performance is measured against that of other nearby utilities. If yardstick competition exists in the area, the local distributor will have to compare favorably with the other utilities or it will be replaced. If this form of competition is not present, the local distributor need not be concerned about meeting the price and services of other utilities.

[95]Farley Direct, 46; 562-64; Alabama Constitution of 1901, § 220.

different franchises in 273 municipalities. Of those, only 26 franchises in 24 locations are terminable; the balance are perpetual.[96]

In terms of its retail sales, in 1973 applicant made 51% of such sales in municipalities where it holds perpetual franchises, 9% in muncipalities where it has terminable franchises, and 40% outside of municipalities (where no franchises are required).[97] Perpetual franchises in Alabama are not exculsive;[98] municipalities may offer competing franchises to other utilities. Under the terms of the Booth Act,[99] however, municipalities may not establish a municipally-owned system without first offering to purchase the facilities of the existing franchisee. Should the franchisee decline the offer, the municipality may establish its own competing system, but the original franchise (unlike in Michigan and in the states served by Otter Tail) would still be in effect.[100] Thus, in the vast majority of its service area, applicant can be subjected to head-to-head competition, but it cannot necessarily be replaced. Due in no small part to the economic difficulties inherent in establishing a competing system, no municipality in applicant's service area has ever set up a distribution system to compete against one of applicant's franchises.[101]

Alabama Power has acquired some other distribution systems since 1950, but it takes pains to point out that none of these acquisitions has been at the expense of municipally-owned systems.[102] The primary acquisition was that of the Birmingham Electric Company (by merger) in 1952.[103] Other acquisitions included Liddell Power Company (a privately-owned utility largely operating in Camden, Alabama) in 1955,[104] the electric facilities of West Point Manufacturing Company (a textile company that previously provided electric service to its former "mill villages") in 1960,[105] and the

---

[96]APP.X JMF-82. Of the terminable franchises, three (Bay Minette, Brewton, and the transmission franchise in Dothan) are listed as "terminable;" the other franchises expire in a certain number of years (usually thirty years after issuance). While our arithmetic does not square with applicant's testimony that it holds franchises in only 261 municipalities (Crawford Direct, 30), the discrepancy may be based on the limited nature of some of the franchises listed in JMF-82.

[97]Crawford Direct, 119. In comparison, 45% of Consumers Power's retail sales were made under perpetual franchises. *Midland*, 6 NRC at 933.

[98]See *Bessemer* v. *Birmingham Electric Co.*, 248 Ala. 345, 27 So. 2d. 565 (1946).

[99]Title 48, Alabama Code §§ 342-347.

[100]There is some question as to whether a municipality possesses the authority to condemn an established distributor's property. See App. Tr. 151.

[101]The town of Ozark initiated a proceeding under the Booth Act in 1956 in an attempt to establish its own distribution system. Applicant elected not to sell its facilities and the town never constructed a competing system. See *Alabama Power Co.* v. *Alabama Public Service Commission*, 267 Ala. 474, 103 So. 2d 14 (1958).

[102]APCO Reply Brief, 39.

[103]Farley Direct, 227-32.

[104]*Id.* at 246-47.

[105]*Id.* at 270-71.

electric facilities of Mount Vernon Mills (another textile company) in 1968.[106] During this same time period, the company sold small amounts of its distribution system in areas into which the cities of Bessemer, Sylacauga, and Opelika extended their corporate limits.[107] In addition to these transactions, applicant has been approached at times by towns requesting that it supply retail service in lieu of the service then being provided by cooperatives.[108] In other instances, unincorporated rural communities presently served by cooperatives have considered incorporating and extending a franchise to applicant.[109]

As mentioned earlier (see pp. 1062, *supra*), there is no head-to-head competition for most electric loads. Nonetheless, all the parties agree that there is some competition for individual loads.[110] This competition occurs in: (1) the town of Samson (served by both applicant and Covington Electric Cooperative, which compete on a house-by-house basis); (2) outlying areas annexed by a municipality where another supplier currently serves at retail;[111] (3) rural areas either where competition for individual loads is permitted (in certain circumstances) by non-duplication agreements or where rural systems are located near each other and have not signed any such agreements; and (4) outlying areas where a municipally-owned system wishes to expand.[112] Applicant argues that the opportunities for such head-to-head competition are "minimal."[113] While we can agree that there is not head-to-head competition for the great percentage of retail sales in the area, we do not believe such competition can be ignored.[114]

---

[106]*Id.* at 322-23.

[107]*Id.* at 247-51.

[108]See, *e.g.*, DJX 4012-24 (Town of Samson); DJX 4205-16 (Fulton); DJX 4319 (Clio); DJX 4320 (Red Level); DJX 4321 (Goshen).

[109]See, *e.g.*, DJX 4185 (Pennington); DJX 4317-4318 D (Riverview).

[110]See, *e.g.*, APCO Reply Brief Below, 228; Justice Proposed Findings, 41-45 (¶¶2.35-2.45). ["_____ Reply Brief Below" refers to the parties' responses below to the proposed findings of fact.]

[111]In such a situation, the system franchised by the municipality (or, if the case may be, a municipally-owned system) can compete in the annexed area with the preexisting distributor. Head-to-head competition can result or the nonfranchised system can sell its facilities to the other system.

[112]In Alabama, there does not appear to be any legal limit to the extent municipally-owned systems may expand outside municipal corporate limits, subject to the grant of a franchise should the system wish to provide service in another incorporated area. In Michigan, by contrast, the expansion of municipal systems beyond municipal corporate boundaries is limited. *Midland*, 6 NRC at 940.

[113]APCO Reply Brief Below, 228.

[114]In this context, we note the following dialogue between applicant's president, Joseph Farley, and counsel for the Department of Justice (at Tr. 20,804-05):

> Q: Don't your franchises substantially protect you against the loss of your retail business?

There is also yardstick competition taking place in Alabama. The Licensing Board wrote: "possibly the yardstick most often used in measuring the performance of any retail distribution system in central and south Alabama is that of another distribution entity in the same area."[115] The presence of yardstick competition plays a significant role in franchise and individual load competition; when one utility cannot meet another's rates or service, it can lose customers.[116]

In sum, retail competition is not completely absent from central and southern Alabama. Nor has applicant shown us any legal prohibitions barring greater competition. To be sure, the *economic* barriers to increased competition are substantial. The same was true in *Midland* where we found the retail market relevant. We repeat what we said there:

> This is not to suggest that competition to distribute electric power in lower Michigan is totally free and open, or even that major market changes are in the offing. But because this potential competition manifests itself only periodically and is more limited than that found in some unregulated markets, it is not for those reasons less deserving of antitrust protection. To accept Consumers' position on the relevant

---

[Mr. Farley]: No sir, they are non-exclusive and there is an awful lot of load that is outside of municipal corporate boundaries, particularly industrial business today tends to locate outside the municipalities rather than in the middle of urban areas.

Q: So the fact that you have franchises that are to a great extent perpetual to serve in municipalities doesn't give you the feeling of being protected against losing business in those areas where you are franchised, Mr. Farley?

A: No sir, they are perhaps of some protection but as I have pointed out to you in the first place we experienced all the 11 counties of northern Alabama in which we had franchises and municipalities and we saw what happened there, that we were not protected there in any sense. We also know that a great deal of growth, industrial and commercial growth at this point in time tends to be outside of municipal corporate boundaries. Municipalities are finding it at least in our area harder and harder to extend their corporate limits and the tendency, as I said, is for a lot of the major industrial growth and some of the commercial growth to be outside of the municipal franchised areas.

Q: Are you saying there is a possibility of competition for such growth to serve such growth electrically, is that right?

A: Well, yes, sir, even when both systems are there. At retail if a load is over a certain size, 200 megawatts, under the tariffs that have been filed without, I might add, protest from the cooperatives, it's either party's business.

[115] 5 NRC at 888.

[116] See, *e.g.*, DJX-4329E (Vanity Fair Mills chooses service from Clark-Washington Cooperative because its bid was lower than applicant's); DJX-4319 (town of Clio expresses interest in service from APCO because cooperative service is more expensive); DJX-203 (City of Dothan challenges applicant's service to the town of Taylor by claiming Dothan's municipal system could provide better and cheaper service).

> retail geographic market would in effect nullify that protection. That result is simply out of line with the recent Supreme Court decisions in this area.
>
> It must also be kept in mind that Consumers was not born with a 77% or 100% portion of that retail market. Rather, it acquired its large share in no small part by the same slow competitive processes that it now suggests are too unlikely and remote for us to consider.

6 NRC at 988-89 (footnotes omitted).

We note too that, in similar circumstances involving the wholesale market in this case, the Licensing Board found the proposed market relevant for antitrust analysis. The Board recognized the obstacles to wholesale competition:

> A municipality served by Applicant under a franchise cannot shift easily to AEC; an AEC member cannot shift readily to Applicant for wholesale power. Clearly we are talking about competition at the margin here. As Applicant's witness Crawford testified in response to a question as to whether there was competition for wholesale loads: "The answer to that question is a qualified yes." (APP.X BJC-A (Crawford) p. 131).

5 NRC at 895.

The Board nonetheless concluded the market was relevant:

> Yet one of the lessons of economics is the importance and efficacy of marginal adjustments. In economic matters, tails often do wag dogs. In this market setting, it is precisely because buyers are often locked into one seller, and a seller limited to a definite geographic area for its retail customers, that the "tail wag" should be preserved. It represents one outlet for the limited competition possible in electric power supply. It is the very type of competition that, in regulated or quasinatural monopoly settings, the antitrust laws should be especially zealous to maintain, either to mitigate any undesirable effects of the market structure or the shortcomings of regulatory authorities. The preservation of this rivalry would seem to require the existence of a number of different buyers and sellers (although not at the expense of economic efficiency).

Id. at 895-96.

We think the same analysis holds true for the retail market. Competition in the market may be limited, but it is nevertheless entitled to protection under the antitrust laws.[117]

3. **The Geographic Market.** There remains the task of defining the geographic boundaries of the retail market. The Licensing Board concluded that no relevant geographic market could be found; it specifically rejected applicant's service area as the relevant market. (5 NRC at 888-89). We disagree.

In determining relevant markets, courts must "delineate markets which conform to areas of effective competition and to the realities of competitive practice." *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701, 710 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978), quoting *L.G. Balfour Co.* v. *F.T.C.*, 442 F.2d 1, 11 (7th Cir. 1971). The District Court in *Mishawaka II, supra*, a monopolization case involving a large Midwestern utility, found the application of this "practical approach" to be "relatively simple." The court explained its determination that defendant's service area constituted the relevant market:

> "The geographic location of the market is usually determined by an examination of the areas in which the particular firm actually competes or operates. If it concentrates its sales and service in one area, this area will normally be the relevant market." E. Kintner, *An Antitrust Primer, A Guide To Antitrust And Trade Regulation Laws For Businessmen*, pp. 102-103 (2d Ed. 1973).
>
> Here, defendant I & M has a clearly defined service area in Indiana and Michigan within which it sells electric power and energy at retail pursuant to franchises granted by the municipalities and townships. I & M has tariffs on file for those areas in the Public Service Commissions of Indiana and Michigan, pursuant to which it offers to sell electricity at retail to all interested buyers. Moreover, as the defendants have stated, no other public utility is allowed to sell electric energy at retail within this area.

465 F. Supp. at 1325.

Applicant protests the use of its service area to denote the geographic scope of the retail market. Its argument is two-pronged: if the test is "the area where applicant sells or can reasonably extend its retail sales," the whole state should be included in the market. If, on the other hand,

[117] *See, Midland, supra*, 6 NRC at 988.

"commercial reality" is used as a guidepost, the market should be broken down into small submarkets where competitive conditions are similar.[118]

We have no trouble in rejecting the contention that the whole state constitutes the appropriate geographic market. We think the Board below applied the correct principle in rejecting the same argument applied to the wholesale market:

> The entire state of Alabama would be an appropriate geographic market area only if wholesale suppliers in northern Alabama (TVA is the obvious entity involved here) could compete for retail loads in central and southern Alabama and Applicant could sell in the eleven northernmost counties of the state as well. Such is not the case.

5 NRC at 893. The Board noted that applicant does not attempt to sell power in the northern counties and that TVA is legally prohibited from selling power in most of the rest of the state. *Ibid.*[119] Given these circumstances, we see no reason to utilize the political boundaries of the state as the geographic limits for the retail market.

It is certainly true, as the applicant points out,[120] that the competitive situation differs in various parts of applicant's service area. But the same was true in *Otter Tail;* the different states involved had different franchise limitations and regulatory requirements, and certain municipalities had greater access than others to alternative transmission lines.[121] Nonetheless, the District Court in that case rejected the argument that each town in the defendant's service area be regarded as a separate geographic market.[122]

In *Midland* as well, the applicant argued that its service area could not be considered a relevant geographic market. In that case, the applicant proposed that an "open/closed" distinction be made; areas where competition was considered highly improbable were to be excluded from consideration.[123] The applicant here offered the same argument to the Board below.[124] We need not rehearse in detail the reasons why we rejected this argument in *Midland.*[125] We do think it worth repeating that, although

---

[118]APCO Reply Brief, 42-44. See also, APCO Reply Brief Below, 209-34.

[119]TVA is prevented by statute (16 U.S.C. § 831n-4(a)) from supplying power in areas not receiving power from TVA before July 1, 1957. Prior to that date, the only systems receiving power from TVA in south and central Alabama were the municipally-owned ones operating in the cities of Bessemer and Tarrant City. 5 NRC at 828, 829, 893.

[120]See APCO Reply Brief, 43.

[121]See 410 U.S. at 371.

[122]331 F. Supp. at 58-59. The District Court's market definition was apparently accepted by the Supreme Court. See 410 U.S. at 369-70.

[123]See 6 NRC at 978-79.

[124]See APCO Reply Brief Below, 228.

[125]See 6 NRC at 983-90.

different competitive factors might justify the division of a market into various submarkets:

> "submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." This is especially true where the charge is that a firm has monopolized that broader line of commerce. [Applicant's] arguments in effect seek to focus our attention on those areas where door-to-door competition is now taking place and to have us ignore those areas where the company has already acquired dominance. To do so would be to manifest tacit acceptance of [applicant's] present market position as sacrosanct. This is simply not the case, legally or factually.[126]

We adhere to the approach taken in *Otter Tail, Midland,* and *Mishawaka II.* Those cases indicate that where a firm operates in a discrete service area and is charged with monopolizing retail sales in that same area, the service area may constitute the relevant geographic market for the purpose of antitrust analysis.

We add one last point. In many cases, the identification of a relevant geographic market is a crucial factor in the case because of its importance in determining a firm's market share (and hence, whether the firm possesses monopoly power). Although we find applicant's service area to be the relevant geographic market for the retail product market, our finding of monopoly power in the retail market is not solely dependent on market shares. See pp. 1071-1074, *infra.*

IV.

MONOPOLY POWER

Our determination that there are three relevant markets involved here must be followed by consideration of whether the applicant possesses monopoly power in these markets. This is so because business practices undertaken by those with dominance in the market may not be acceptable even though they would be legitimate if undertaken by those less powerful.[127]

---

[126] 6 NRC at 990, quoting *United States* v. *Greater Buffalo Press,* 402 U.S. 549, 553 (1971) and *United States* v. *Phillipsburg National Bank,* 399 U.S. 350, 360 (1970).

[127] *Midland, supra,* 6 NRC at 913, citing *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2nd Cir. 1945); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 812-14 (1946); *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 342-46 (D. Mass. 1953), *affirmed per curiam,* 347 U.S. 521 (1954); *cf. U.S. Steel Corp.* v. *Fortner Enterprises,* 429 U.S. 610, 612 fn. 1 (1977).

As we did with the Licensing Board's decision that the wholesale market is a relevant one (see pp. 1046-1047, *supra*), we adopt as our own that Board's decision that the applicant does indeed have monopoly power in the wholesale market.[128] Because, however, that Board believed no other markets to be relevant, it had no occasion to examine the extent of the applicant's control of those markets. We do so now.

A. Coordination Services Market

Once again we look to the teachings of *Midland* to help us determine whether the applicant here possesses monopoly power in the coordination services market. As we there explained (6 NRC at 998):

> The nature of the coordination services market does not . . . lend itself to an easy calculation of market shares. A utility is both buyer and seller in this market. Whether in any given time period it is a *net* buyer or a *net* seller is in part fortuitous, depending on operating conditions in its own and its neighboring power supply systems. Justice therefore undertook to show Consumers' possession of monopoly power in this market directly, by proving that its control of access to the market and its domination of power generation and transmission within it gives the company that power. This is a valid approach. (Emphasis in original).

Applicant's domination of power generation and transmission in its area of service is evident. The applicant is a vertically and horizontally integrated electric utility engaged in the generation, transmission and distribution of electricity.[129] As observed by the Board below, applicant's generating capacity in 1974 was 6,246 MW; it had additional planned capacity scheduled to be operative in 1979 of 2,380 MW.[130] It generates all of the power for its retail power needs. Disregarding the federally-owned capacity utilized in central and southern Alabama, applicant in 1974 held approximately 98% of the generating capacity in that area.[131]

In contrast, AEC had generating capacity in 1974 of only 137 MW, and a total planned capacity, scheduled for 1979, of 557 MW. It generates only a portion of the power requirements of its members.[132] As mentioned

---

[128]Applicant has excepted to the Licensing Board's treatment of its in-house distribution of bulk power as sales in the wholesale market. APCO Brief, 38-40. For the reasons given by the Board below (5 NRC at 890-92, 894-96) and by us in *Midland* (6 NRC at 990-97), we agree that such in-house distribution properly belongs in the market.

[129]5 NRC at 820.

[130]*Id.* at 821-22, 898.

[131]*Id.* at 898-99.

[132]*Id.* at 824-27, 898-99.

previously (see p. 1037, *supra*), none of the members of MEUA owns or operates any generating facilities.[133]

As for transmission, the applicant owns all transmission lines in the market over 115kv and controls all transmission facilities providing access to utilities outside the market area. With respect to lower voltages, applicant is also dominant. AEC owns 995 miles of generally low voltage transmission lines, only 15% of the amount owned by the applicant.[134] For their part, the members of MEUA own only 71 miles of low voltage lines.[135]

Although the above is only a rough description of the generating and transmission facilities in central and south Alabama, the dominant position of the applicant in either activity is readily apparent. Its dominance, particularly over the transmission facilities in south and central Alabama, places the applicant in a unique position to control access to the market for coordination services. By refusing to "wheel" power,[136] it is able as a practical matter to prevent the other utilities operating in the area from coordinating with the larger utilities outside it. This was aptly demonstrated at the hearing below.

During the course of the hearing, the question of how AEC might best coordinate its power generating expansion plans with the purchase of power from the applicant to meet AEC's projected power needs came up for consideration. In this connection, it was brought out that AEC was in the process of installing two 210 MW generating units on the Tombigbee River. This prompted the question of how the surplus capacity in those units, were they to be completed, could be disposed of by AEC if the applicant did not purchase it. The possibility of some third utility was suggested. But to dispose of the surplus capacity, it was conceded by applicant's witness that the transmission facilities of the applicant would have to be used.[137] If, for whatever reason, the applicant decided not to accommodate AEC, the cooperative would not be able to dispose of its surplus generating capacity.[138]

The applicant, however, claims in its brief that AEC is already connected to the system of the Georgia Power Company at the Walter F. George Lock and Dam. It argues that "there is no reason why AEC cannot, if it so desires, engage in power supply transactions with Georgia Power or through Georgia Power's system with Duke Power Company, South

---

[133] *Id.* at 827.
[134] *Id.* at 900-01.
[135] *Id.* at 827.
[136] "Wheeling" is a term of art in the electric power industry, defined as the "transfer by direct transmission or displacement [of] electric power from one utility to another over the facilities of an intermediate utility." *Otter Tail Power Co.* v. *United States*, *supra*, 410 U.S. at 368.
[137] Harris, Tr. 25,443-44.
[138] *Id.*, 25,444-45.

Carolina Electric and Gas, Savannah Electric or Florida Power Corporation, all of which are interconnected with Georgia Power's system."[139] It also claims that AEC owns major transmission lines in close proximity to existing lines of Gulf Power Company and has other lines only a short distance from the South Mississippi Electric Power Association's system. The applicant suggests AEC can interconnect with these utilities and through them with others.[140] On the other side, Justice points out that "AEC has no interconnection to any utility other than Applicant."[141] This means that without the use of applicant's facilities, additional costly transmission lines would have to be built before AEC is able to coordinate power supply activities with Georgia Power.[142] From the standpoint of the nation's resources and the economy of the ratepayers that would be affected, constructing new lines when adequate facilities exist results in waste and places an additional, unnecessary burden upon ratepayers. In any event, there is no assurance that the other utilities mentioned would engage in the arrangements for the different type of coordination services which would be made possible were interconnection physically available.[143] We reject the applicant's position. It simply has failed to rebut the showing that its predominant control of transmission and generation gives it monopoly power over the sale of coordinated services in the relevant market area.

B. Retail Market

We wrote in *Midland* that the retail market lends itself to traditional market share analysis, with market shares being determined by calculating the amount of electric energy in megawatt hours (MWh) each utility sold to its retail customers. 6 NRC at 1009-1010. Applying these methods of determining market shares to the case at bar, the retail market in southern and central Alabama was divided (in 1972) as follows:[144]

---

[139]APCO Brief, 29.

[140]*Ibid.*

[141]Justice Reply Brief, 30. We accept the validity of this statement inasmuch as applicant's own witness has testified that in any disposition of surplus power by AEC from its planned Tombigbee units, the transmission facilities of the applicant will have to be used. Harris, Tr. 25,444.

[142]An eight-mile extension of a 115 kv line with switching and other equipment to permit interconnection would cost from about $500,000 to $750,000. Brownlee, Tr. 25,663.

[143]According to AEC's counsel, AEC has "no idea whether Georgia [Power] would be willing to engage in it." App. Tr. 106.

[144]Wein, Direct, 67; Foltz, Tr. 12,841-43.

	MWh sold (x 1000)	% of market
Alabama Power Company	21,657	88
Municipal Systems	1,610	7
Distribution Cooperatives	1,335	5
Alabama Electric Cooperative	62	0

Applicant's share of 88% is clearly sufficient in normal circumstances to warrant the inference of monopoly power.[145] Applicant argues, however, that reliance on market shares is misplaced in this case. It claims that the economic characteristics of the industry (and its attendant regulation) result in higher market shares than would be found in a more conventional industry. Moreover, we are told, state and federal regulation of applicant's activities prevent it from possessing monopoly power.[146]

These arguments are nearly identical to those made by Consumers Power, and rejected by us, in *Midland*.[147] We have carefully reviewed that earlier ruling and its application to the facts of this case. We conclude that applicant's argument must fail; we find it possesses monopoly power in the retail market.

In the first place, the economic setting of the industry supports the finding that applicant possesses monopoly power. We have noted earlier that, while competition is legally permitted in Alabama, the economic barriers to the entry of new competitors in the industry are high indeed.[148] As we pointed out in *Midland*, high entry barriers reinforce the inference of monopoly power suggested by high market shares.[149]

More importantly, applicant's dominance of transmission and generation facilities further bolsters the finding of monopoly power. As the Board below noted, this dominance enables applicant to influence its present and

---

[145]See *Midland*, 6 NRC at 1010-11 and cases there cited.

[146]APCO Brief, 35-37; APCO Reply Brief, 52-53. Applicant advanced these arguments in the context of monopoly power in the wholesale market (no retail market having been found below). Although we deal with them here in the context of the retail market, our discussion and the arguments themselves apply with equal force to both markets.

[147]6 NRC at 1011-19.

[148]See p. 1062, *supra*.

[149]6 NRC at 1012-13, citing *Weber* v. *Wynne*, 431 F. Supp. 1048, 1054-56 (D.N.J. 1977); *United States* v. *United Shoe Machinery Corp.*, *supra*, 110 F. Supp. at 343-44; *Golden Grain Macaroni Co.*, 78 FTC 63, 163 n. 9, 180 (1971).

potential competitors' access [illegible] inputs necessary [illegible] production and sales of reliable [illegible] firm bulk power.[150] [illegible] dominance of what in essence [illegible] factors of production [illegible] industry, viewed in conjunction [illegible] high market shares [illegible] high economic barriers facing [illegible] would ordinarily [illegible] finding of monopoly power in the [illegible]

It is at this point that the second [illegible] applicant's argument [illegible] itself. Monopoly power has long [illegible] the power to control [illegible] or exclude competitors.[151] Applicant [illegible] believe that the [illegible] and state regulation of its activities [illegible] from either [illegible] possessing monopoly power [illegible] prices or excluding competitors [illegible]

We have already supplied a [illegible] this argument [illegible] (939-942, supra). We need only [illegible] answer by adding [illegible] that a vertically-integrated utility's [illegible] monopolize a retail market [illegible] not dependent on its ability to set [illegible] rates. In Otter Tail, [illegible] the defendant cut off its retail competitors [illegible] of wholesale power [illegible] Mishawaka II, the defendant threatened [illegible] its competitors' supply [illegible] and additionally charged them excessive [illegible] wholesale power [illegible] supply. In both cases, it was the [illegible] the retail systems [illegible] vertically-integrated competitor for [illegible] supply that enabled the integrated utility to monopolize the [illegible]

There is no question in this case that [illegible] competitors are [illegible] or partially dependent upon applicant [illegible] of electric power [illegible] such a situation, the courts in Otter Tail and Mishawaka II found [illegible] defendants to be possessed of monopoly [illegible] despite the existence of the same federal regulatory scheme under which applicant operates.[152]

Nor do we believe the existence [illegible] Alabama Public Service Commission (APSC) changes matters [illegible] regard. For example, the Licensing Board found that the applicant [illegible] refused (or threatened to refuse) to sell wholesale power to [illegible] to the military facilities [illegible] 5 NRC at 942-45. In [illegible] applicant [illegible] circumstances, it [illegible] that state law prohibits such a refusal [illegible]

---

[150] 5 NRC at 938-941. Although the Licensing [illegible] monopoly power only [illegible] wholesale markets, we think it self-evident [illegible] basic components [illegible] monopolize the bulk power would yield the [illegible] market. [illegible] United States v. E. I. du Pont de Nemours and Co., supra, 351 U.S. at 391 [illegible] United States, [illegible] 781, 811 (1946).

[151] See, e.g., United States v. Grinnell Corp., supra [illegible]

[152] In Mishawaka II, for example, the Court [illegible] mechanism by which [illegible] defendants were able to circumvent [illegible] their wholesale [illegible] an effort to drive retail competitors out of [illegible] at 1327-29. We do not [illegible] that the applicant here pursued a similar course [illegible] that if it had chosen [illegible] federal regulation would not have saved [illegible]

[153] 5 NRC at 944.

appear [illegible] order from the APSC which eventually [illegible] provided the power. But the state [illegible] applicant's initial refusal to deal. [illegible] belated aid from regulatory bodies, [illegible] and costly litigation, is not an [illegible] self-evident that such an inadequate [illegible] to deprive a regulated utility of [illegible]

Having [illegible] monopoly power in each of the [illegible] to the charges that it has improperly [illegible]

VI.

[illegible]

A. [illegible]

Our [illegible] determinations on the various charges [illegible] that the Board did an unusually [illegible] discussing and analyzing the sometimes [illegible] the various transactions. It examined [illegible] applicant's misuse of its monopoly power [illegible] the evidence bearing on each claim and [illegible] witnesses who gave pertinent testimony. [illegible] viewed the evidence as sustaining [illegible] charges.[155]

---

[154] [illegible]

[illegible] that the customer has been [illegible] You cannot give refunds to a corpse.

[155] The [illegible] with the antitrust laws relate to the following:

(1) [illegible] between 1968 and 1972. 5 NRC at [illegible]

(2) [illegible] agreements with AEC [illegible] alternate sources of [illegible]

(3) [illegible] customers of the Southeastern [illegible] purchase all their additional power [illegible]

(4) [illegible] power to Ft. Rucker. Id.

As mentioned at the outset of our opinion, all parties dispute the Licensing Board's conclusions. The applicant contends that the Board was correct in rejecting the bulk of the charges but that it erred in its five findings of anticompetitive conduct. The other parties argue the opposite. Each of these contentions the Board below did not go far enough. While agreeing with the Licensing Board's findings of anticompetitive conduct, these parties challenge on various particulars that the Board erroneously decided that other activities were not anticompetitive.[28] It has thus become incumbent upon us to examine the record on all these charges ourselves.[29]

---

(28) [illegible] of smaller utilities from regional coordination [illegible] summary of the aspects of applicant's conduct which were found [illegible] with the antitrust laws [illegible] in the Board's Phase II decision [illegible] 1488-89 [illegible] cover the following:

1. The [illegible] coordination for economy and reliability which applicant [illegible] of the Southern Company pool.

2. [illegible] through use of judicial and administrative forums [illegible] for the construction of new generation and transmission lines.

3. [illegible] wholesale rate reductions to AEC according to time when AEC was [illegible] of generating facilities.

4. The [illegible] Interconnection Agreement between applicant and AEC with elimination of the "[illegible]" provision).

5. [illegible] relating to ownership participation by AEC and MEAG in the [illegible] project.

6. [illegible] relating to the generating plant proposed to be constructed by [illegible], Oklahoma.

7. [illegible] opposing construction by [illegible] of high voltage transmission [illegible].

8. [illegible] of "price squeeze" practiced by applicant.

9. [illegible] courts and administrative agencies.

10. [illegible] anticompetitive conduct by the applicant such as efforts to [illegible] systems, attempted acquisition of [illegible] new shopping center near [illegible], Alabama.

(29) We [illegible] while we generally accord deference to [illegible] settled law [illegible] the "clearly erroneous" standard of review employed by the federal courts of appeals. Where our review of the evidentiary record convinces us that a different result is warranted, we are free to substitute our judgment for that of the Board. See, e.g., [illegible] at 1022-23; *Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), [illegible] 402-05 (1976); K. Davis, [illegible] Treatise 29 (St. 1980), §[illegible].

We have done so, but from a somewhat different perspective than that of the Licensing Board. This stems principally from two factors. The first is that unlike the Licensing Board — which found the applicant to possess monopoly power only in the market for wholesale power — we have found that applicant has monopoly power in the coordination services and retail power markets as well. This means that we must look upon the applicant's conduct as that of a dominant business enterprise wielding monopoly power over the entire range of activities in which it engages, and judge it under a harsher light than that of a less dominant business concern. As we stated on another occasion, judicial and FTC rulings teach that "the actions of a dominant business enterprise have to be tested against a more stringent standard than applies to actions of smaller concerns in highly competitive markets."[18]

The other principle affecting our view of the record is that the evidence must be viewed in its entirety and not with the eye focused only on isolated segments as though they were independent of each other. For the courts have stressed

> the importance of viewing the evidence as a whole to give the antitrust plaintiff the full benefit of his proof, rather than tightly compartmentalizing the case and wiping the slate clean after considering each piece of evidence."[19]

In this connection, the applicant's opponents accuse the Licensing Board, in denying all but five of their claims of misuse by the applicant of its monopoly power, of giving inadequate attention to the pattern of anticompetitive conduct indicated by the record. We agree with their position on this point.

Our own examination of the record with these two principles at the fore suggests strongly that it would be permissible for us to find any number of additional alleged instances of misconduct to have been part of an anticompetitive pattern and thus subject to obloquy. But weighing the record is in no small part a matter of judgment. We must recognize and accept that the Licensing Board heard the witnesses and evaluated their demeanor at first hand; we have only the printed word on the cold page before us. In these circumstances, we are unpersuaded that there is sound cause to substitute our own judgment on most of the conclusions reached below. The licensing boards are, as we have said before, this agency's

---

[18] *Midland*, *supra*, 6 NRC at 913.

[19] *Id.* at 914, citing *United States v. Empire Gas Corp.*, 537 F.2d 296, 299 (8th Cir. 1976), *Cert. denied*, 429 U.S. 1122 (1977).

principal fact finders.[160] We thus accept the Licensing Board's findings except in two areas where the record compels findings of a situation inconsistent with the antitrust laws: the first deals with the applicant's selective use of low wholesale rates to discourage AEC from constructing its own generating stations; the second concerns the applicant's refusal to extend an ownership interest in the Farley plant to AEC. We now deal with these matters in order.

1. **Low Wholesale Rates.** The Licensing Board examined four instances in which APCO was alleged to have lowered its wholesale rates for the purpose of preventing AEC from installing generating units. The Board rejected the allegations, finding no anticompetitive conduct in each instance. Specifically, the Board concluded:

(1) A 1941 rate reduction to a number of utilities, which came at a time when certain distribution cooperatives were forming AEC and were seeking an REA loan to construct new generation and transmission facilities, was legitimately motivated by applicant's desire to reduce its number of different wholesale rates and not to forestall self-generation by AEC. 5 NRC at 908-09.

(2) A 1946 rate reduction offer to AEC, made after AEC applied for an REA loan to construct a new steam plant and associated transmission lines, was to allow applicant to continue selling wholesale power to AEC and "to dissuade AEC from proceeding with its plans to construct [a generating plant and transmission] which applicant considered uneconomical and wasteful duplication of its existing facilities;" was made in good faith with the encouragement of REA; and was not anticompetitive in intent or motive. *Id.* at 910.

(3) A 1950 offer to AEC of a rate reduction, after AEC had again taken action to obtain REA funds for the construction of another version of its earlier planned steam plant, "had the distinct purpose of improving the reliability of AEC's electric system," and did not represent "anticompetitive conduct with the clear purpose of maintaining a monopoly in self-generation." *Id.* at 911.

(4) A 1958 rate reduction to cooperatives and municipals (the so-called "Coosa" reduction) was essentially forced upon applicant as a condition of applicant's receiving licenses to develop hydroelec-

[160] *See Catawba, supra,* 4 NRC at 404.

tric projects on the Coosa River, and was not anticompetitive. *Id.* at 912-13.

With respect to the Coosa rate reduction, we are satisfied with the findings made below. We do, however, take a different view of the three earlier reductions. We believe they were instituted for the purpose of preventing AEC from developing its own generation, and as such were inconsistent with the antitrust laws.

As a preliminary matter, we address the Licensing Board's treatment of the *Noerr-Pennington* doctrine. That doctrine, established by the Supreme Court in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), essentially renders immune from antitrust liability actions which seek to influence legislatures, courts, and other governmental bodies even though they are undertaken for anticompetitive purposes. A third case, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), limited the doctrine somewhat by providing that sham attempts to influence official action are not immune.[161] As the Board below recognized in an order issued during the Phase I hearing,[162] evidence of conduct designed to influence governmental action can be used for two purposes. First, a party is always free to show that the conduct falls within the sham exception to *Noerr-Pennington*. Second, according to the principles set out in *Pennington* footnote 3, a party can use exempt activities as evidence of general anticompetitive intent in order to shed light on nonexempt activities.[163]

In this case, there is no question that applicant actively used legal and administrative proceedings in attempts to prevent AEC from installing its own generation.[164] Applicant's opponents argued below that this use of the legal process fell within the sham exception (and thus was itself inconsistent with the antitrust laws), and that, even if such activity is exempt from

---

[161]For example, good-faith litigation may be exempt from antitrust liability, but the repetitive filing of frivolous legal claims for the sole purpose of harming a competitor is not. See, *e.g.*, 404 U.S. at 513; *Otter Tail, supra*, 410 U.S. at 380.

[162]LBP-75-69, 2 NRC 822 (1975).

[163]381 U.S. at 670 n. 3. The footnote reads as follows:

> "It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transaction under scrutiny.' "

[164]See 5 NRC at 902-08.

antitrust liability, the Board should derive from it evidence of applicant's anticompetitive intent. The Board found the activity protected.[165] It further ruled that "there is no room for application of *Pennington* footnote 3 regarding the admissibility of immunized transactions to shed light on the 'purpose and character' of nonimmunized transactions, because the challenged litigation was both immunized and itself not anticompetitive under the antitrust laws."[166]

We can readily agree with the Board's determination that the use the applicant made of administrative and judicial process is protected under *Noerr-Pennington*. The Board's handling of *Pennington* footnote 3 is quite another matter. We read that footnote as plainly allowing the admission of evidence concerning "immunized" transactions where such evidence sheds light on nonimmunized transactions.[167] As applicant itself admitted, protected *Noerr-Pennington* material may be used "to show purpose or character of other evidence under scrutiny."[168]

We now turn to the matter of applicant's low wholesale rates. The Licensing Board was unable to find that the rate reductions "represented anitcompetitive conduct with the clear purpose of maintaining a monopoly in self-generation."[169] We think applicant's otherwise protected use of judicial and administrative proceedings sheds a good deal of light on those rate reductions. It seems clear to us that applicant was strongly opposed to AEC's installation of generation. Nor do we doubt that the institution of low rates could have served to undermine AEC's efforts in this regard. All this added to the timing of the reductions in question (each occurred at a time when AEC was seriously pursuing new self-generation options) leads us to the compelled inference that the reductions were motivated with the intent of discouraging AEC's self-generation.

Interestingly enough, the Board below agreed that a purpose of the 1946 reduction was to prevent AEC from pursuing a proposal to build a 23 MW plant at Gantt. Although the Board found that the 1941 and 1950 reductions were motivated by applicant's desire to lower the number of rates in its rate structure and to improve the reliability of AEC's system (see p. 1072, *supra*), we find the timing of the reductions more than a

---

[165] *Id.* at 902-08, 940-41.

[166] *Id.* at 941 (reference omitted).

[167] *See Schenley Industries, Inc.* v. *New Jersey Wine and Spirit Wholesalers Ass'n.*, 272 F. Supp. 872, 886 (D.N.J. 1967), wherein the District Court wrote:

> In a footnote to the *Pennington* opinion, the Supreme Court did leave open the use of evidence on protected lobbying activity in the manner Schenley proposes, namely, to demonstrate anticompetitive intent.

[168] APCO Reply Brief Below, 286.

[169] 5 NRC at 911.

coincidence. We can agree with the Licensing Board that the applicant's use of the governmental processes available to it was conduct protected under *Noerr-Pennington*. But the full circumstances surrounding applicant's rate reductions, including its history of legal opposition to AEC generation, compel the conclusion that the reductions were part of a long campaign to forestall AEC from installing its own generating capacity.

Our only difficulty in reaching this conclusion stemmed from unease at adopting the notion that AEC could suffer a legally cognizable injury from having a low rate offered, not to one of its competitors, but to itself. Unlike the usual situation, where the offended party is helpless in the face of price concessions offered either to its competitors or to its potential customers, AEC here had the power to defuse the applicant's tactic. It simply could have declined to let the opportunity to purchase power at a reduced rate deter it from building its own generating capacity.

The short answer to our concern is that, owing to the applicant's monopoly position, AEC had no *practical* alternative to accepting the reduced rate and dropping its plans for expansion. Not only its own short term fiscal health — a critical matter to a business lacking a monopolist's power — was at stake; but a refusal of the applicant's offer would have brought down upon it the objections of the REA and others who might point out that the insistence on going ahead appeared to involve an unnecessary duplication of effort.

What we are left with, then, is the conclusion that these lowered rates were the opening salvo in the pattern adhered to through the years in which the applicant sought to forestall AEC from installing its own generating capacity, and to keep AEC as a captive customer — even at the cost of short-term profit — rather than allow it to develop as a competitor, thus assuring applicant's long-term health. As already indicated, it might be possible to build on this to find that a great many more instances of anticompetitive conduct fit into this same pattern. We decline, however, to do so, giving due deference to the analysis of the Board below.

One final matter remains. The Licensing Board found, in regard to the 1946 reduction, that applicant was properly motivated by a desire to prevent "uneconomic and wasteful duplication." (5 NRC at 910.) In the first place, we do not understand why AEC's construction proposal necessarily involved a duplication of applicant's facilities. Applicant has built numerous generating facilities; if its chief concern was duplication, it could have staggered AEC's proposed construction in with its own plans. More important, we do not believe an ostensible desire on the part of a monopolist to avoid "wasteful duplication" constitutes a legitimate defense under the antitrust laws to charges that the monopolist has prevented prospective competitors from entering a market. The argument that it does

is merely another version of the regulated industry defense we addressed earlier (see pp. 1039-1042, *supra*). An electric utility may prefer to avoid competition, but it cannot accomplish this goal through anticompetitive means.[170]

2. **Denial of Ownership Access to Farley**

a. The other count on which the record compels us to disagree with the Licensing Board involves the applicant's alleged denial of ownership access to the Farley units. The Board below declined to find that the applicant had denied such access to AEC. According to that Board, there was no "hard evidence substantiating" such a charge; that on the contrary Mr. Farley, applicant's President, "made it quite clear in his testimony before the Board that Applicant does not take the position that it would not sell ownership." 5 NRC at 929.

With all due deference to the Licensing Board, we construe the record differently. Our assessment of all the surrounding evidence persuades us that although the applicant never explicitly stated it was absolutely rejecting the possibility of selling an ownership share in Farley to AEC, it fully intended not to make such a sale unless forced to do so.

From at least 1969, it was applicant's policy to maintain sole ownership in the Farley plant. This was made clear in an internal confidential memorandum of the company circulated among the officers and attorneys representing it in negotiations with AEC.[171] That memorandum stated in unequivocal language: "The company is unalterably opposed to potential demand from one of more distribution cooperatives, or from AEC, for part ownership in the SEALA nuclear plant."[172] This policy remained essentially unchanged over the years.[173] Thus, it is not surprising to find that even

---

[170]See also *Davis-Besse, supra*, 10 NRC at 323-27.

[171]D.J. 6040; Vogtle, Cross, Tr. 23,135.

[172]D.J. 6040, p. 4. "SEALA" was the earlier name for the Farley plant.

[173]On April 6, 1971, shortly after AEC expressed an interest for joint ownership of the plant, the applicant filed Amendment No. 13 to the license application for construction of the Farley units. The amendment stated: "The plant is planned to be wholly owned by Alabama Power Company and is not planned for construction or operation as a joint venture with any other entity." See Justice Brief, 79. In this regard, James H. Miller, Jr., a senior vice-president of Alabama Power who participated in various negotiations and discussions with AEC concerning interconnections and joint ownership participation in Farley, testified:

> CHAIRMAN GLASER: Mr. Miller the company has never been in favor of a joint ownership arrangement with AEC to your knowledge; has it?
>
> THE WITNESS: Not to my knowledge, no. sir.

Miller, Tr. 21,476.

though AEC expressed interest in acquiring a share in the Farley plant as early as 1971,[174] some two years later applicant was still arguing for the sale of unit power.[175] To be sure, applicant's representatives met with AEC on repeated occasions to discuss the subject of access to Farley power,[176] but the meetings did not progress much beyond the exploratory stage. During this period, the applicant's main efforts were directed not so much towards seeking an acceptable agreement on the joint ownership of the plant but in getting AEC to agree to the purchase of wholesale or unit power. The result was that when these hearings began in late 1974, the parties were far from reaching agreement on joint ownership of Farley, even in principle.[177] The effect of applicant's actions was to deny AEC reasonable access to Farley.

In holding that the applicant acted to deny AEC an ownership in the plant, we have fully considered the testimony of Mr. Farley. But unlike the Board below, we find in it no support for the proposition that the applicant did not have a position against selling an ownership share in the plant. Rather, we find it to point forcefully the other way.

For its conclusion that the applicant had no position against selling an ownership interest in Farley to AEC, the Board below relied on two statements made by Mr. Farley at the hearing. On one occasion, Mr. Farley was asked whether his company was willing to provide the municipalities

---

[174]Letter from AEC to Mr. Farley dated April 27, 1973. App. Exh. BMG-21.

[175]As late as November 26, 1973, AEC's overtures toward acquiring an ownership interest in the Farley plant were being met by a recitation of claimed barriers against any kind of joint ownership arrangement. AEC Exh. 32. It is significant that the existence of problems claimed to be serious obstacles to joint ownership of the Farley plant were not raised until some two years after AEC's expression of interest in the plant. In 1974, the applicant was still resisting the sale of a share in Farley to AEC. On October 29 of that year, applicant's counsel Mr. Balch wrote to AEC's counsel Mr. Boskey outlining the applicant's understanding of the positions of the parties expressed at a meeting which had been held earlier among representatives of both organizations. In that letter, applicant's counsel continued to urge that "the most fruitful approach to this matter from Alabama Power's point of view is to consider a unit power approach which avoids the complex problems which would arise from any attempt at this time to restructure the ownership of the Farley units." App. Exh. 173 at pp. 11-12. Earlier, on August 16, 1973, Mr. Farley had written to AEC urging that it purchase "power from a mix of the company's generation under applicable rate schedules and, thereby, in effect, have access to the Farley plant." The letter went on to indicate that, inasmuch as AEC indicated a desire to participate specifically in Farley, the applicant invited discussions to explore the possibility of unit power purchase by AEC. AEC Exh. 30.

[176]5 NRC at 929.

[177]By late 1974, the parties had not yet reached the stage of negotiating over firm proposals. On June 20, 1974, AEC wrote to Mr. Farley to raise several matters including the desire for a meeting to resume discussion on a joint ownership arrngement for the Farley plant. AEC Exh. 35. Mr. Vogtle responded for the applicant. On the subject of joint ownership, the response was no more than a bland invitation to discuss the matter at the next meeting with the request that AEC "furnish any definitive proposal to the Company for review" before the next meeting. AEC Exh. 36. By October of that year the applicant was continuing in its pursuit of a unit power arrangement with AEC. See fn. 175, *supra*.

and AEC access to Farley units by means of ownership participation. Mr. Farley's response was:

> The matter as to ownership has been discussed with representatives of the cooperatives and to a certain extent, the municipals, and the company is in this position, that we have not taken the position that we would not sell ownership.[178]

Later in the hearing, Mr. Farley was again asked about the request of AEC for an ownership share of the Farley plant. In response to this question by a Licensing Board member, the following transpired:

> [MR.FARLEY]: We have been in negotiations with the Cooperative in ways that have certainly been explored here in this hearing heretofore. I don't consider the sale of the company's property or ownership in the plant or something of that nature quite in the same light that I do the offering of the utility service or utility coordination. We have not, obviously, reached agreement with the cooperative on the sale of a portion of the plant but it is not inconceivable that we might.
>
> MR. MILLER: What does that mean, Mr. Farley?
>
> THE WITNESS: It means, sir, that as of this point in time, as I have answered questions heretofore, Mr. Miller, that we don't have a policy that we would not sell a portion of a plant because we may. We think it's got all kinds of problems with it.[179]

True enough, one could read these statements to convey the thought that the applicant has no position *against* the sale of an ownership interest in the plant.[180] But to succumb to this would be to be misled by the applicant's judicious phrasing of its answers in the double negative. That tactic cannot obsure the fact that the company has steadfastly avoided indicating directly that it *would* share ownership. When other testimony of Mr. Farley is considered, it clearly appears that the applicant did not intend to sell. This becomes even more patent when Mr. Farley's statements are viewed alongside the company's dealings with AEC after the time in 1971 when AEC expressed interest in acquiring an ownership interest in the plant.

---

[178]Farley, Cross, 19,185.

[179]Farley, Cross, 20,599.

[180]At another instance during the hearing, Mr. Farley was asked about the company's policy toward joint ownership of the plant with others. To this, Mr. Farley's reply was that "there just simply isn't a policy on it." Farley, Cross, 19,198-99. We find this answer inconsistent with the 1969 policy statement and the action subsequently taken by the applicant.

The crucial testimony came after the exchanges relied on by the Licensing Board. Mr. Farley was asked by counsel for the Department of Justice whether the applicant was willing to offer ownership participation in the Farley plant to AEC. Mr. Farley responded:

> I find it difficult to answer the question yes or no . . . .

When asked by the Licensing Board Chairman for an explanation, Mr. Farley replied:

> If this Board were to impose a license condition which were to be upheld that the Company should sell an interest in the nuclear plant, then we'll sell an interest in the nuclear plant.[181]

Thus, when pressed on the point of the applicant's willingness to enter into a joint ownership agreement with AEC, Mr. Farley's testimony was that the company would do so — but only under compulsion by this agency. Stated in more direct terms, Mr. Farley was saying in effect that the applicant had no intention of voluntarily entering into an arrangement with AEC for joint ownership of the plant.

Mr. Farley's last statement is even more revealing when considered in the context of the 1969 statement in which the policy of the company is expressed as being "unalterably opposed to sharing in the ownership of the plant with AEC or with any one or more of the cooperatives."[182] Viewed in that light, it becomes clear that the company had a position: to resist to the last selling an ownership share of the plant to AEC.[183]

b. Our inquiry does not end here. The next step we must take is to determine whether applicant's conduct respecting its refusal to sell an ownership interest in the Farley plant constituted anticompetitive action. For the reasons which follow, we hold that it does.

In Part IV of our decision, we found that the applicant possessed monopoly power in the wholesale and retail markets for electricity in

---

[181]Farley, Cross, 27,949-50.

[182]See p. 1081, *supra*.

[183]The question of whether applicant denied MEUA ownership access is a much closer one. Nothing in the record indicates that applicant would have viewed an ownership request from MEUA more favorably than that from AEC. On the other hand, after reviewing the testimony of Mr. St. John carefully, it seems clear to us that MEUA did not pursue ownership access as actively as did AEC. See Tr. 4547-98. We are particularly concerned with the timing of MEUA's request, which appears to have come well after this proceeding got under way. Tr. 4551-4580.

We believe resolution of this matter is unnecessary to our disposition of the case. We can assume that if a timely request was made, it would have been rejected. The key issue remains whether MEUA is entitled to ownership access. We discuss that point later (see pp. 1124-1125, *infra*).

central and south Alabama and in the coordination services market in that area. Being possessed of monopoly power, the applicant is precluded by Section 2 of the Sherman Act from willfully using it to preserve or extend its monopoly, to foreclose actual or potential competition, to gain competitive advantage or to destroy competitors. Moreover, it is not only full-fledged violations of the antitrust laws that are of concern in these licensing proceedings. Section 105c of the Atomic Energy Act, which governs the proceeding here, condemns as well conduct which runs counter to the policies underlying those laws.[184]

Viewed against these limitations on permissible conduct by one who is a monopolist, we have no hesitancy in concluding that the applicant's actions in denying AEC a joint ownership share in Farley constituted anticompetitive behavior. The evidence leaves no doubt in our minds that the actions of the applicant in this regard were deliberately directed toward avoiding sharing in the ownership of the plant for fear that granting AEC an ownership interest in the plant would lead to erosion of the applicant's wholesale and retail business. As candidly put by Mr. J. H. Miller, Jr., applicant's senior vice-president:

> Should intervenors be allowed to acquire a portion of the Farley Nuclear Plant, extending the utilization of subsidized financing, it could bring about an inherently unfair competitive position between them on the one hand and Alabama Power on the other. It could, in fact, in the long-term place Alabama Power's competitive position in jeopardy to such a point that Alabama Power would no longer be viable.

Miller, Direct, 150.[185]

---

[184] *Midland, supra*, 6 NRC at 1019; see pp. 1044-1046, *supra*.

[185] The testimony of Mr. Farley was to the same effect:

> Q. [Mr. Leckie, Justice Counsel]: You were concerned, though, in the time period 1969 to 1971 with the possibility that your wholesale business might be eroded if you were to sell a share of the Farley Unit to Alabama Electric and/or to the municipal systems?
>
> A. [By Mr. Farley]. We were concerned that the differentials through these facts and financing costs might cause a problem, yes, sir.
>
> Q. Were you concerned with a possible erosion of retail business at that time?
>
> A. Yes, sir, because all along has been the concept in Alabama Electric Cooperative's request that we wheel for them where ever they want. And that would include retail. That thread has been through many of our discussions and negotiations and that remained then and it remains now.

Although the possible future loss of business is undoubtedly of legitimate concern to any business enterprise, it cannot be used by a monopolist to justify conduct designed to preserve or enhance its dominant position in the competitive market. At the very least, if not a violation of the antitrust laws, such conduct runs counter to the policies underlying those laws.

That observation unquestionably applies to the situation here. Applicant's 1969 policy statement and the testimony of its two senior officers leave no doubt as to the company's short and long-range objectives in refusing to share in the ownership of Farley: the preservation of its dominant power in the wholesale and retail markets for electricity in central and south Alabama. That objective, as we have seen, is one that is condemned by Section 105c and the antitrust laws referred to therein. This being so, it follows that action undertaken by the applicant toward that end is no less unacceptable under the law.

B. MEUA's Appeal

MEUA was denied a remedy below because the Board found that there was no "significant actual or prospective competition between [MEUA and applicant] at the retail distribution level." 5 NRC at 961.[186] Implicit in this denial was the Board's view that MEUA was also not a competitor in the wholesale market.[187] MEUA's appeal is thus essentially double-barreled; it contends both that the rejection of the retail market was incorrect and that it was wrongfully excluded from the wholesale market.

As we explained earlier (see pp. 1059-1068, *supra*), we disagree with the Licensing Board's rejection of the retail market. Before we analyze the effect of this finding on MEUA's case, we turn to the claim that the Licensing Board erroneously excluded MEUA from the wholesale market.

CHAIRMAN GLASER: In fact, hasn't it been the case that the company's been concerned about Alabama Electric Cooperative taking away Alabama Power Company's customers since the inception of the cooperative?

THE WITNESS: Well, sir, I wouldn't say, Mr. Chairman, since the inception of it because this didn't really get to be, well, several years — in the early days of its — in the late '40's, perhaps, would be a better time. I think the cooperative was organized about '41 or '42, or something like that and it was some years after that before the west —

CHAIRMAN GLASER: In any event, for the last 20 years the company has been concerned about it?

THE WITNESS: Yes, sir.

Farley, Cross, 20,802-04.

[186]In the ensuing discussion, the term MEUA refers to both the organization collectively and its members singularly.

[187]See 5 NRC at 1484 n. 5.

1. **Wholesale Market.** Although the Licensing Board determined that there was a relevant wholesale market in central and southern Alabama, it excluded MEUA from the remedial hearing on the grounds that MEUA was not an actual or potential competitor in the market.[188] MEUA, Justice and staff dispute this ruling, arguing on appeal that the municipals are potential competitors. They argue that this is true because the municipals are on the edge of the market, that applicant's activities in the past have discouraged their entrance, and that such entrance is feasible if the municipals are granted a share of the Farley facility.[189] MEUA relies on a second string to its bow. In the alternative, it argues that its members are currently in competition in the wholesale market. We deal with this latter argument first.

a. MEUA advances two bases on which it would have us find that it is presently in actual competition in the wholesale market. It first notes that although it now does not engage in selling power at wholesale, one of its members, Riviera Utilities,[190] at one time provided wholesale service in Baldwin County. It then claims that Riviera was forced out by applicant's anticompetitive conduct. To prevent the applicant from benefiting from its wrongdoing, MEUA's argument is that we should look upon the market in terms of the situation existing at the time Riviera engaged in wholesale service and not the present. Secondly, MEUA argues that its decision to purchase wholesale power instead of supplying its own needs through self-generation is a form of present wholesale competition.

We need not devote much attention to the argument that the exercise of a decision to "make-or-buy" is an indication that actual competition for the sale of wholesale power exists. All MEUA's decision to buy tells us on the record of this case is that it is a wholesale customer of the applicant. Without any generating capacity of its own, we simply do not believe that MEUA as a buyer of electricity at wholesale is in actual competition with a selling entity.

The question of MEUA's past role in the market is a more complicated matter. Although Riviera Utilities lost its last wholesale customers during the course of the proceeding below,[191] there is no dispute that Riviera at one time provided wholesale service to other retailing entities. Indeed, in its description of wholesale competition, the Licensing Board included

---

[188] *Ibid.*

[189] MEUA Brief, 22-41; Justice Brief, 54-61; Staff Brief, 23-26, 40-42.

[190] Riviera Utilities is the name of the municipally-owned utility in the town of Foley.

[191] MEUA Brief, 25; 5 NRC at 828.

references to competition between Riviera and applicant.[192] Nonetheless, the Board excluded MEUA from the market without explanation.

Although the Licensing Board did not deal directly with Riviera's role in the wholesale market, it did limit sellers in the market to "those entities generating and providing bulk electric power to distribution entities." 5 NRC at 890. Riviera, it should be pointed out, was not a generating entity. MEUA challenges any suggestion that generation is a precondition to being in the market; it claims the market should include all entities selling bulk power to distribution systems.[193] The fact that Riviera no longer sells power at wholesale, we are told, is not relevant, if Riviera is excluded from the market, "any monopolist would be immune from antitrust liability upon accomplishing destruction of its rival."[194]

We can agree with MEUA up to a point. Theoretically, ownership of generation need not be a prerequisite to entrance in the wholesale market. And certainly any destruction of a competitor is a fact we could hardly ignore. But our assessment of the record simply does not comport with that of MEUA.

The town of Foley acquired Riviera Utilities in 1941.[195] Riviera at the time had three wholesale customers in south Baldwin County: the towns of Robertsdale and Fairhope, and the Baldwin County Electric Membership Cooperative. It supplied its wholesale and retail power requirements, in 1941 and at all times afterwards, through wholesale purchases from applicant. Eventually, all of Riviera's wholesale customers decided to take service from applicant instead.

Although MEUA would have us believe that applicant was responsible for Riviera's loss of its wholesale customers, the record indicates otherwise. We find that Foley's role was purely that of a middleman; it purchased power from one party and sold it at a markup to another. Its wholesale customers were prevented by contractual barrier from dealing with applicant directly; when the barriers were removed, the customers elected to receive their power from applicant. In this regard, it should be noted that applicant charges uniform wholesale rates throughout the state; it did not lower its rates to attract the new business. Applicant further claims[196] — and the record does not indicate otherwise — that it received no additional revenue from its new customers; it simply sold the same amount of power at the same price without going through a middleman. When questioned

[192]5 NRC at 895, citing, *inter alia*, St. John, Direct, 10-14; DJX 4298, 4301, 4308-4311; Tr. 23,477-23,487.
[193]MEUA Brief, 24.
[194]*Id.* at 26.
[195]APCO Reply Brief, 45.
[196]APCO Reply Brief, 46 n. 312.

about the loss of Riviera's wholesale customers, Mr. St. John was unable to point to any conduct on applicant's part in taking over service to Riviera's customers that could be considered wrongful.[197] Nor did he indicate that Riviera sought cheaper sources of bulk power elsewhere (if any were in fact available). In these circumstances, we are simply unwilling to say that applicant contributed to the destruction of its wholesale rival. Common sense would seem to indicate that a wholesale supplier that does nothing more than buy power from one supplier and sell it at a higher price to distributors will be unable to remain in existence if their customers can deal directly with the supplier.[198] Riviera having lost its customers through operation of market forces, we find no basis for faulting the applicant in this regard. This being so, whatever the competitive situation may have been when Riviera was a seller of wholesale power, the fact is that MEUA is not now an actual competitor in the wholesale market.

b. As mentioned earlier, Justice, NRC Staff, and MEUA all argue that MEUA is a potential competitor in the wholesale market. Our attention is directed to any number of court decisions dealing with potential competition as it affects mergers under Section 7 of the Clayton Act.[199] Applicant questions the propriety of relying on merger cases to determine whether MEUA's members are potential competitors at the wholesale level.[200] We need not decide this issue, for we do not believe MEUA qualifies as a potential entrant even under the principles enunciated in the cases it cites.

The reasoning for our rejection of the notion that MEUA is a potential entrant to the wholesale market is founded upon our assessment of its ability to enter the market. We accept, for the purposes of argument, MEUA's contentions that it is eager to enter the market, that it is in a similar line of commerce, that actual penetration of the market is unnecessary, and that MEUA is the most likely new entrant.[201] Nonetheless, we read the cases as requiring a showing that MEUA is either (1) capable of entering the market on its own, or (2) currently influencing competitive conditions in the market. MEUA has not made either showing.

---

[197]See Tr. 3683-94.

[198]In this connection, see *New England Power Co.* v. *Federal Power Commission*, 349 F.2d 258, 260 (1st Cir. 1965), wherein the F.P.C. noted that the prevailing industry practice was for the middleman to be eliminated and that the Commission could see no reason why the middleman in the case should not be eliminated.

[199]*E.g.*, *United States* v. *Marine Bancorporation*, 418 U.S. 602 (1974); *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *Federal Trade Commission* v. *Proctor & Gamble Co.*, 386 U.S. 568 (1967); *United States* v. *Penn-Olin Chemical Co.* 378 U.S. 158 (1964); and *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

[200]APCO Reply Brief, 48 n. 322.

[201]See MEUA Brief, 31-41.

A look at the cases helps illuminate the nature of these requirements. In *Marine Bancorporation,*[202] the acquisition of a Spokane, Washington bank by a Seattle bank seeking to penetrate the Spokane market was allowed; the Supreme Court found that the purchase did not eliminate the Seattle bank as a potential competitor in the Spokane market because the bank lacked other feasible means of entering the market. The Court thus allowed the acquisition to take place. 438 U.S. at 632-639.

In *Falstaff,*[203] the Supreme Court reversed and remanded a decision approving a national brewery's purchase of a New England brewery. The District Court found conclusive the testimony of witnesses for the acquiring firm indicating that it would not have entered the New England market by any other means. The Supreme Court thought otherwise:

> The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market . . . . [I]f it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under § 7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.

410 U.S. at 533-534.

In *Procter & Gamble,*[204] the acquisition of a bleach manufacturer by a company specializing in household products was disallowed. The Supreme Court found, *inter alia,* that the acquisition would eliminate the acquiring company as a potential competitor in the market for bleach. There was no evidence indicating that the acquiring company intended to enter the bleach market *de novo;* however, the Court found it to be a potential competitor on the ground that *de novo* entry was feasible and that the threat of *de novo* entry exerted "considerable influence on the market.' " 386 U.S. at 580-581.

In the two other cases relied upon by MEUA, *Penn-Olin* and *El Paso,*[205] the potential competitors were substantial forces. In *Penn-Olin,* the court

---

[202] See fn. 199, *supra.*
[203] *Ibid.*
[204] *Ibid.*
[205] *Ibid.*

found both merging companies capable of entering the market independently and noted that even if only one company entered the market, the other could have exerted a procompetitive influence by virtue of its position on the edge of the market. 378 U.S. at 173-176. In *El Paso,* the acquired company (Pacific Northwest) was found to have the capability to enter the California market and to have been "a substantial factor in the California market" through its attempts to enter the market. 376 U.S. at 658-661.

All these cases have a common thread: in each case the test for determining whether a company would be considered by the Court to be a potential competitor in a relevant market involved whether it had a present capability of entering that market or was reasonably viewed by others in the market as having the capability of entering it at any time it desired.

In the case at bar, MEUA seeks to establish its capability of entering the market through rather curious, indeed circular, reasoning. MEUA in the past has forsaken generation because of the costs involved.[206] In this regard, the Board below found that the municipality of Dothan had not seriously considered installing generation (5 NRC at 930-31); we agree with this finding. No solid evidence was shown to indicate that MEUA is considering building its own generation in the near future; the best that could be said for MEUA's members is that they might possibly be interested in installing peak-sharing units.[207] Nor did MEUA identify any other potential bulk power supplier it has considered dealing with in order to reduce its dependence on applicant's generation. MEUA's potential entrance in the market seems instead to hinge on access to Farley. If it is allowed to purchase a share of the plant, we are told, MEUA will be able to compete at wholesale with applicant.[208] In fact, MEUA's counsel admitted at the Phase II hearing that access to Farley is "a *sine qua non* of it being likely or feasible for [MEUA] going into the wholesale market." Tr. 27,022.

Like the Licensing Board, we are left unmoved by this reasoning. The ultimate issue in this case is whether this agency should mandate that applicant accord intervenors access to the Farley facility. In terms of potential competition, we believe MEUA's capability to enter the market must be assessed without regard to the Farley facility.[209] And the record indicates that, without access to Farley, MEUA does not have the

---

[206]Tr. 3635; 27,029-30.

[207]See Tr. 3878-3888, 3907-3909. At the time of the hearing below, it appeared that MEUA had made no real studies addressing the installation of peak-sharing generation. Tr. 3907.

[208]MEUA Brief, 30-31.

[209]In this regard, it is useful to explore what MEUA's role in the market would have been if the Farley facility were never built. MEUA's counsel was questioned about this at the Phase II hearing; while his response was necessarily speculative, it is certainly clear that MEUA's entrance into the market would have been far more difficult than that of the potential competitors in the cases it cites. See Tr. 27,030-27,033.

capability to enter the wholesale market. We simply can not accept MEUA's argument that if it is granted access to Farley, it could compete in the wholesale market — and that therefore it is a potential competitor in the market and is entitled to such access.

Nor can MEUA claim recognition as a potential competitor in the market for wholesale power on the basis of the second test — that it is currently influencing competitive conditions in the market. MEUA contends that applicant was aware of the municipal systems' desires to install generation and reacted to this desire by pursuing a course of anticompetitive conduct.[210] According to MEUA's argument, the applicant inserted anticompetitive conditions into its wholesale contracts in order to prevent AEC and MEUA from installing generating units. But the Licensing Board found no evidence to support this charge. (5 NRC at 932). Applicant may have been aware of MEUA's desire to enter the market and that MEUA would encounter difficulties in installing generation,[211] but it does not necessarily follow that applicant's conduct was dictated thereby. If a company does not possess the capability to enter a market, it must be assumed, absent evidence to the contrary, that its activities or even its presence do not affect competitive conditions in the market.[212] Given these circumstances, we cannot conclude that MEUA exerted an appreciable influence on the wholesale market.[213]

2. **Retail Market.** Because the Licensing Board found the retail market not to be a relevant one, it did not address the competitive situation at retail between MEUA and applicant. Before the question of remedy for MEUA can be addressed, we must first examine this retail situation and how it has been affected (if at all) by applicant's past conduct.

a. MEUA is composed of the municipal systems of the following 12 cities: Alexander City, Dothan, Fairhope, Foley, LaFayette, Lanett, Luverne, Opelika, Piedmont, Sylacauga, Troy, and Tuskegee. All twelve purchase the bulk of their power supply from applicant; eleven receive additional power from SEPA.[214] 5 NRC at 827-828.

---

[210]MEUA Brief, 32.

[211]MEUA Brief, 29.

[212]*Marine Bancorporation, supra*, 418 U.S. at 639-640.

[213]We note here that our finding that MEUA is not likely to install its own generating capacity in the future, coupled with the fact that its members have produced no power in the recent past, lead us to the conclusion that MEUA should not be considered a participant in the market for coordination services in central and southern Alabama. Nothing we have seen in the record below changes our view that non-generating utilities have no appreciable role to play in that market. See fn. 82, *supra*.

[214]The City of Troy purchases no SEPA power; it acquires all its power from applicant. 5 NRC at 828.

Mr. H. Sewell St. John, Sr., the Secretary-Treasurer of MEUA, testified below at great length on the nature of retail competition in central and southern Alabama. His testimony indicated that there is some head-to-head competition, usually for large new loads, between applicant and at least five members of MEUA.[215] This competition has been limited in part by the existence of territorial agreements between applicant and all five of the municipal systems, but it nonetheless must be reckoned with.

While Mr. St. John was able to show that competition between applicant and MEUA exists, neither he nor any other witness was able to identify any harm that a municipal system had suffered because of applicant's assertedly anticompetitive conduct. This is not to say that applicant has never acted in a manner inconsistent with the antitrust laws in its dealings with the municipals; the Board below found (and we agree) that applicant's wholesale contracts with the municipal distributors on their face would discourage the latter from installing their own generation and transmission and from dealing with alternative bulk power suppliers. But we are simply unconvinced that these contractual provisions had any effect on the municipal's retail business.

In the first place, no evidence was presented to indicate that the municipals were either seriously interested in or capable of building their own generating plants or seeking out other bulk power supplies.[216] It can by no means be taken as a given that, at a time when applicant's wholesale rates were concededly low and economies of scale were allowing the construction of larger and more efficient units, isolated municipalities would have chosen to enter the generating field.[217] Nor can we assume, without supporting evidence, that the municipalities would have looked elsewhere for power. As Mr. St. John pointed out (St. John, Direct, 17), even with access to applicant's transmission lines the number of wholesale suppliers the municipals could have feasibly dealt with was limited. We are

---

[215]See Tr. 2894 *et. seq.* (Opelika); Tr. 2928 *et. seq.* (Alexander City); Tr. 2996 *et seq.* (Sylacauga); Tr. 3059 *et seq.* (Piedmont); and Tr. 3512 *et. seq.* (Dothan).

[216]We find instructive the examples referred to by MEUA in its brief as illustrative of applicant's success in discouraging the municipals and AEC from developing alternate sources of bulk power. With the exception of applicant's alleged refusal to coordinate with Dothan (see fn. 217, *infra*), all relate to situations involving applicant's dealings with the cooperatives instead of with the municipalities. See MEUA Brief, 56-77.

[217]As far as the record shows, only one municipal, Dothan, considered installing its own generation. The Licensing Board found that there was little evidence presented on this issue (5 NRC at 930-31); we agree. As best as we can tell, Dothan commissioned a study to investigate alternative methods of acquiring bulk power and the study recommended that Dothan continue to purchase power from applicant. See App. X 9. The consultants who performed the study did not explain their decision in their report and they were not called to testify. As for the other municipals, Mr. St. John stated that they never reached the stage of spending money on engineering studies because they did not believe they could generate power as cheaply as they could purchase it. Tr. 3,635.

never told who these potential suppliers were, what their wholesale rates were, or whether they actually had power available. Nor was our attention pointed to an instance where a municipal system investigated the possibility of using applicant's transmission to buy elsewhere.

The second basis for our belief that the municipals were not harmed by any of applicant's anticompetitive practices stems from the municipals' past success in the retail market. The last municipally-owned system taken over by the applicant was that of the town of Headland more than forty years ago. Tr. 2797. And in those towns where Mr. St. John described retail competition between applicant and municipals, the municipals seem to be holding their own.[218] Mr. St. John admitted that the municipals have been profitable, and that applicant has not prevented them from subsisting as viable business entities.[219] Our own review of Mr. St. John's testimony leaves us unconvinced that applicant has even attempted to suppress the municipals, much less succeeded in doing so.

b. MEUA makes one other argument in connection with the retail market. It contends at great length that, since the early 1970's, its members have been subject to a price squeeze rendering them incapable of competing for new industrial loads.[220] It asserts that since that time the applicant has charged MEUA excessively high rates for the wholesale power it purchases.

The Licensing Board rejected the price squeeze argument. It noted that a price squeeze was not apparent on the evidence presented by MEUA. The Licensing Board also saw "no evidence that MEUA members are anything but financially viable." 5 NRC at 939. In addition, it found other evidence in the record which weakened, if not vitiated, the validity of the charge. Moreover, it found that even if a squeeze had existed as charged, it was not of sufficient significance for purposes of Section 105c of the Act.

---

[218]See, *e.g.*, Tr. 2906-07 (Opelika successfully competed for a shopping center); Tr. 3043-44 (although applicant has a franchise to compete for loads of more than 100 kva in Sylacauga, the municipal system serves all such loads); Tr. 3512 (Dothan served industrial customer outside its contractually-assigned areas).

[219]Tr. 4079-4081. Our point here is not that the applicant lacked the economic power to drive the municipals under, but that the record before us does not show that it attempted to do so. Compare *Midland, supra*, 6 NRC at 1018-19.

[220]See MEUA Brief, 89-108; MEUA Proposed Findings Below, 52-89. As defined by the Licensing Board (5 NRC at 937):

> A price squeeze involves the economic behavior of a vertically integrated firm *vis a vis* [a] rival who is not similarly integrated. If a manufacturer both marketed its product through its own distribution channel and sold to independent distributors as well, the manufacturer would be engaging in a single price squeeze if it unduly raised the wholesale price to the independent distributors who competed with the manufacturer at retail. A double price squeeze occurs if, in addition to the tactic just mentioned, the vertically integrated manufacturer unduly lowered the retail price of the product in its own outlets as well.

We agree with the Licensing Board's handling of the price squeeze issue. In the first place, we cannot accept the definition urged upon us by MEUA that a price squeeze occurs whenever "a retailer cannot purchase at a wholesale rate sufficiently low to enable it to compete . . . [at retail with its wholesale supplier] and produce a positive margin sufficiently high to cover the costs."[221] This definition purportedly reflects the reasoning applied in the landmark *Alcoa* case.[222] But we do not believe that case established such a protectionist standard.[223] The correct focus of a price squeeze, as the Board below found, is on the pricing policies of the integrated firm. In this case, the crucial factor is whether applicant's wholesale and retail prices adequately reflect production costs.[224] The Board below found no evidence that applicant's retail rates have been kept unjustifiably low,[225] and nothing alluded to in MEUA's brief convinces us that applicant's wholesale rates are set unfairly high.

Beyond the question of whether a price squeeze has in fact occurred, we think it important to reiterate the Licensing Board's view of the consideration that can be given to evidence of a price squeeze in an NRC antitrust proceeding. We are not empowered to establish wholesale rates; that function resides in the FERC. We are interested in evidence of a price squeeze only insofar as it sheds light on the "intent and purpose of Applicant in its competitive relationship with other parties."[226] For the reasons set forth by the Licensing Board, we do not believe MEUA has met its burden in advancing this contention; the evidence does not establish that applicant has set its retail and wholesale rates at levels designed to prevent MEUA from competing for industrial customers.

With our assessment of the factual record made below now complete, we turn to the question of remedy.

---

[221]MEUA Brief, 92.

[222]*United States* v. *Aluminum Company of America*, 148 F.2d 416, 436-438 (2d Cir. 1945).

[223]While Judge Learned Hand never explicitly delineated the elements of a price squeeze in *Alcoa*, he did find that the defendant's price for the raw material was higher than a "fair price." *Id.* at 437.

[224]5 NRC at 937 n. 265.

[225]*Id.* at 939.

[226]5 NRC at 940.

VI.

REMEDY

In the proceeding below, the Licensing Board — finding five instances of anticompetitive action by the applicant and invoking several "public interest" considerations — ordered the imposition of a number of conditions on the licenses which may be issued to the applicant for the two units of the Farley Nuclear Plant. The principal conditions required the applicant (1) to provide AEC with access to the Farley plant in the form of unit power; (2) to provide transmission services to enable AEC to make effective use of that power; and (3) to provide AEC with backup bulk power to cover those situations when Farley is down for maintenance or other causes. 5 NRC at 1501-09. The Board below considered the conditions warranted upon a "weighing and evaluating [of] the various antitrust and other public interest concerns." *Id.* at 1501-02.

These conditions extended benefits only to AEC. The Licensing Board ruled that MEUA was not entitled to relief because "there was no significant actual or prospective competition between Applicant and [MEUA] at the retail distribution level, nor other conduct of Applicant toward MEUA or its members which was inconsistent with the antitrust laws within the meaning of Section 105c of the Atomic Energy Act." 5 NRC at 1484. A grant to MEUA of access to Farley under those conditions, according to the Board, "might be considered an unwarranted attempt to restructure the electric power industry at the retail level, rather than fulfilling the statutory mandate of antitrust review under Section 105c." *Ibid.*

All the parties object. The applicant's basic position is that no remedy in the form of license conditions is warranted by the Licensing Board's findings. If license conditions are nonetheless found necessary, we are told, the sale of wholesale power rather than unit power would be more appropriate.[227] On the other hand, the remaining parties argue that the remedy does not go far enough. For various asserted reasons, each of these parties claims that the Licensing Board erred in not ordering more extensive relief — generally ownership access to the Farley plant and greater access to APCO's transmission facilities. Their thesis is that, on the facts of this case, a stronger remedy that that imposed by the Licensing Board is mandated by the Atomic Energy Act and applicable principles of antitrust law.

[227] APCO Brief, 82-89.

A. Remedial Standards Under Section 105c

In view of our findings that the applicant engaged in anticompetitive conduct beyond that which the Board below attributed to it, we need not decide whether the license conditions imposed by the Licensing Board constituted a remedy appropriate to the limited "liability" findings it made. Our finding that the applicant's refusal to grant AEC ownership access to Farley constituted anticompetitive action, along with the other determinations made by us in Parts III, IV, and V, *supra*, have significantly changed the dimensions of the "situation inconsistent" which must be considered in determining the remedy. The decision that is called for on our part, therefore, is not so much a determination of whether the relief ordered by the Licensing Board should be upheld, but rather what remedy we believe to be appropriate in light of the "situation inconsistent" as *we* find it.

This brings us to the question of the standard to be applied in determining the license conditions for the plant. The applicant argues that "an antitrust tribunal, given a choice of remedies addressed to anticompetitive conduct, should choose the least onerous adequate remedy available."[228] It goes on to say that "[i]n the context of Section 105c(6) of the Act, 'the adequacy' of a particular remedy depends upon two principal factors: (1) on a case-by-case basis, whether the remedy neutralizes the impact of the licensed facility upon the competitive situation in a particular market in light of the affirmative findings under Section 105c(5) and detailed evidence of the existing competitive situation in that market; and (2) whether the remedy selected has a nexus to the Applicant's activities under the license."[229] Implicitly, the applicant is telling us that the Commission's remedial antitrust authority is a narrow one, extending only to the neutralization of whatever competitive advantage the licensed facility may add to the preexisting competitive situation and limited to the activities under the license.

The other parties have a far more expansive view of the Commission's remedial authority. They suggest in varying ways that the Commission has the authority to impose any license conditions it deems necessary to cure or eliminate the situation found inconsistent.[230]

We find the applicant's view of the Commission's antitrust remedial authority unduly restrictive. It cannot be sustained by the language of Section 105c of the Act; nor is it supported by the legislative history of that provision.

---

[228] *Id.* at 84.

[229] *Id.* at 85 (footnotes omitted).

[230] Staff Brief, 32-35; Justice Brief, 9-16; AEC Brief, 41; MEUA Brief, 126.

In both *Midland*[231] and *Davis-Besse*,[232] we had occasion to consider the scope of the Commission's remedial authority under Section 105c.[233] In the latter case, we were confronted with the argument, like the nexus argument of the applicant here, that the Commission may only grant relief that would govern activities under the license. We disposed of that argument with the following answer:

> To begin with, the limiting phrase "activities under the license" is not in Section 105c(6) which governs the scope of relief. To the contrary, paragraph (6) is cast in the broadest terms. In pertinent part it provides where the Commission finds a situation inconsistent with the antitrust laws that it "shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate." The provision conveys the message that Congress did not want nuclear plants authorized in circumstances that would create or maintain anticompetitive situations without license conditions designed to redress them. This construction is fully warranted on the face of paragraph (6). This is also the meaning specifically ascribed to it by its congressional authors, the Joint Committee on Atomic Energy:
>
> > "The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) [of Section 105c] . . ."

---

[231]6 NRC at 1094-1100.

[232]10 NRC at 282-94.

[233]The pertinent paragraphs of Section 105c are (5) and (6). They read:

> (5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a.
>
> (6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

10 NRC at 291 (references omitted).

Then, we went on to explain:

> When construing this provision [Section 105c(6)] in *Midland*, we stressed that "no type of license condition — be it a requirement for wheeling, coordination, unit power access, or sale of an interest in the plant itself — is necessarily foreclosed as a possible form of relief. Section 105c imposes no limits in this respect; it gives the Commission 'authority . . . to issue a license with such conditions as it deems appropriate.' " In other words, as we explained when faced with similar arguments in *Wolf Creek*, "[S]ection 105c(6) simply directs the Commission to place 'appropriate' conditions on licenses where necessary to rectify anticompetitive situations. This is an invocation of the Commission's discretion, not a limitation on its powers. Had Congress wished to do the latter, it would have said so in unmistakable terms."
>
> The idea that the remedies in the antitrust arsenal are sufficient to overcome the violations is neither original nor recent. Rather, this settled tenet is one of the "principles developed by the Antitrust Division, the Federal Trade Commission, and the Federal Courts" which we apply in proceedings under section 105c. The Supreme Court has reiterated that "relief in an antitrust case must be 'effective to redress violations' and 'to restore competition.' " And "adequate relief in a monopolization case should . . . render impotent the monopoly power found to be in violation of the [Sherman] Act."

Id. at 292 (references omitted).

In sum, the Commission's remedial authority under 105c(6), while not boundless, is more extensive than the applicant believes. The Commission has wide discretion in fashioning "appropriate" license conditions "where necessary to rectify anticompetitive situations." "[N]o type of license condition — be it a requirement for wheeling, coordination, unit power access, or sale of an interest in the plant itself — is necessarily foreclosed as a possible form of relief."[234] And the license condition need not be confined in its application to activities under the license. This is not to suggest, however, that the Commission's authority to impose "appropriate" license conditions is *carte blanche*. The authority to act may not be divorced from the purposes of the legislation. It does not include the authority to employ

[234] *Midland, supra*, 6 NRC at 1099.

license conditions "as an implement to restructure the electric utility industry."[235]

The question then remains: What are the considerations which the Commission may factor into its decision of "appropriate" license conditions? In its decision, the Board below considered not only antitrust factors but other "public interest" factors as well in arriving at the appropriate license conditions for the Farley facility. These public interest factors included (1) the "need for power" (*i.e.*, the need for the generating capacity represented by the Farley plant to meet the anticipated power demands of the applicant's service area); (2) AEC's tax and other advantages stemming from its status as an electric cooperative; (3) the "grandfathered" nature of the antitrust review associated with the fact that construction permits for Farley were applied for prior to the enactment of Section 105c in 1970; and (4) the Board's finding that all anticompetitive conduct by the applicant had ceased by early 1972. According to the Board, Section 105c(6) of the Act mandated that it consider these public interest factors in addition to the relevant antitrust factors:

> It is indisputable that these antitrust laws embody a fundamental national policy regarding the preservation of competition in our economic system. But a finding of inconsistency with the antitrust laws under Section 105c(5) does not end the inquiry, but leads to a consideration of other public interest factors in accordance with Section 105c(6). The latter section requires the Commission then to consider "such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest" (42 U.S.C. Section 1235(c) (6)).

5 NRC at 1496 (footnote omitted).

The propriety of the Licensing Board's use of these public interest considerations as mitigating factors in fashioning appropriate license conditions is disputed by several of the parties.[236] AEC argues that under Section 105c(6), public interest factors may be taken into consideration only to determine whether to issue or continue a license. Where as here no one is urging the refusal, rescission or revocation of a license, AEC claims that those public interest factors cannot be invoked to allow less stringent license conditions.[237] AEC sees this result as required by the portion of the first sentence of Section 105c(6) (underscored in its brief) directing the Commission to consider certain factors necessary to protect the public

[235] *Id.* at 1100.

[236] Staff Brief, 43-47; Justice Brief, 28-34, 41-52; AEC Brief, 28-31, 35-38.

[237] AEC Brief, 29-31.

interest "in determining whether the license should be issued or continued."[238] The NRC staff and Justice follow a different tack. Rather than taking issue with the propriety of considering public interest factors in fashioning appropriate license conditions, they disagree with the Licensing Board's use of those factors in this case. Specifically, they do not believe public interest considerations here lie in favor of mitigating license conditions which otherwise might be appropriate.[239]

Because we are undertaking to determine the appropriate license conditions ourselves based on a set of findings different from that on which the Licensing Board premised its conditions, it is bootless to spend effort on each detailed aspect of the Licensing Board's assessment of the public interest considerations factored into its decision.[240] In a more general vein, however, we disagree with AEC's reading of Section 105c(6) that public interest considerations are relevant only for determining whether a license should issue or have its life extended.

In resting on the quoted portion of the first sentence of Section 105c(6) for its interpretation of the statute, AEC gives the Section too crabbed a reading. Its error lies in its failure to give full effect to the remaining sentence of the Section: "On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate." With the single qualification that the Commission decision be based on its findings, the operative words of the sentence are without restriction. This being so, we decline to read Section 105c(6) as precluding the Commission from considering the "need for power" and other public interest factors in its determination of license conditions and from imposing less onerous conditions if it decides that both the situation inconsistent found under (5) and the public interest findings under (6) make those conditions appropri-

---

[238]The first sentence of Section 105c(6), with the portion emphasized by AEC in italics, reads as follows:

> "In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, *in determining whether the license should be issued or continued*, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest."

Id. at 29.

[239]Staff Brief, 43-47; Justice Brief, 41-52.

[240]The Board's assessment can be found at 5 NRC at 1496-1501.

ate.[241] This, of course, does not mean that antitrust concerns should be ignored or overriden by other public interest considerations. For as the Joint Committee's report expressly states, except in an extraordinary situation, the Commission's action under paragraphs (5) and (6) should harmonize both antitrust and public interest considerations.[242]

B. Appropriate Remedial Conditions

1. **Objective.** Our task, then, is to decide on the license conditions which serve here to "harmonize both antitrust and such other public interest considerations as may be involved." But before we embark on that journey, we turn again to the Atomic Energy Act for an analysis of the purposes and objectives to be served by our decision.

One of the basic foundations on which the Atomic Energy Act rests is the principle of free competition in private enterprise. This principle is manifested at the very outset of the Act by the policy declaration that the "development, use, and control of atomic energy shall be directed so as to ... strengthen free competition in private enterprise."[243] This policy finds manifestation again in Section 105 of the Act. In that Section, the Congress made it clear that the national antitrust laws were to continue in full force and effect with respect to atomic energy matters. It did so by explicitly providing that "[n]othing contained in the Act shall relieve any person from the operation" of the antitrust laws (subsection 105a); and by following with a provision (subsection 105c) which calls for an antitrust review of every nuclear power plant prior to its construction. Thus, through the mechanism of the antitrust laws, the Congress sought to protect free competition in private enterprise in the development and use of atomic energy. Nor did Congress stop with the protection afforded by the antitrust laws. It significantly widened the area of potential Commission action by directing that the policies underlying the antitrust laws must be given effect

---

[241]That findings under both (5) and (6) are to be taken into account in fashioning license conditions is made clear in the Report of the Joint Committee on the bill which enacted Section 105c into law:

> The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time, accommodating the other public interest concerns found pursuant to paragraph (6). Normally, the committee expects the Commission's actions under paragraphs (5) and (6) will harmonize both antitrust and such other public interest considerations as may be involved.

Report by the Joint Committee on Atomic Energy to accompany H.R. 18679, H.R. Rep. No. 91-1470, 91st Cong., 2d Sess., p. 31 (1970).

[242]*Ibid.*; *accord, Midland, supra*, 6 NRC at 1098 fn. 733.

[243]Atomic Energy Act, Section 1; 42 U.S.C § 2011.

as well. As a further measure of protection, the legislation was not limited to situations involving actual violations of the antitrust laws or the then-underlying policies. Situations involving the *reasonable probability* of contravention of those laws and the policies clearly underlying them were also made subject to remedial action by the Commission.[244]

The remedial action the Congressional authors had in mind was that "except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5)."[245] And as we emphasized earlier (p. 1114, *supra*), this concept is consistent with settled tenets of antitrust practice as manifested by the actions of the courts and the federal agencies which deal with those laws: relief in an antitrust case must be effective to redress violations and to restore competition.[246]

2. **Ownership Access to Farley.** In the earlier portions of our decision, we determined that the applicant enjoyed a dominant position in all three product markets. We also determined that the applicant had acted inconsistently with the antitrust laws and the policies thereunder in seven different instances, including its refusal to share ownership of the Farley plant with AEC. We found that this refusal to share in the ownership of Farley was in furtherance of the applicant's long held objective of preserving the dominant power which it enjoyed in all aspects of the electric power business in central and southern Alabama. Upon full consideration of the situation and the requirements and objectives of the Act, the conclusion we must reach is clear: To eliminate the concerns and to strengthen free competition in private enterprise, the license to the applicant for the construction and operation of the Farley plant must, as a minimum, include conditions providing (1) AEC with an opportunity to obtain a proportionate share in the ownership of the plant and (2) reasonable transmission or wheeling services as may be needed by AEC and MEUA.

In lieu of an ownership share in Farley, we considered a license condition — such as that imposed by the Board below — requiring the

---

[244]Report of the Joint Committee on Atomic Energy on S4141, S. Rep. No. 91-1247, 91st Cong., 2d Sess., p. 14 (1970), discussed in *Midland, supra*, 6 NRC at 926-27.

[245]S. Rep. No. 91-1247 (see fn. 244) at p. 31. In placing the responsibility on the Commission to fashion the appropriate remedy where the antitrust situation was found wanting, these same Congressional authors recognized that "there is not a clear boundary between antitrust considerations in relation to the strengthening of free competition in free enterprise and measures to accomplish such objective for reasons other than the antitrust laws or underlying antitrust policy." Rather than trying to legislate the boundaries of the antitrust considerations, the Joint Committee left it to the Commission to decide. In the Joint Committee's words: "the Commission will have to exercise discretion and judgment." *Id.* at p. 15.

[246]*Davis-Besse, supra*, 10 NRC at 292.

applicant to offer to AEC a share in Farley in the form of unit power. We reject that alternative. We find it would neither strengthen free competition in the applicant's market area nor eliminate the antitrust concerns which we found to exist in that market.

In a unit power arrangement, the purchaser is charged for all of the owner's costs of providing that power, including the costs of capital, of construction, and of fuel and operation. Where the owner is a private utility such as the applicant here, the charge to the purchaser includes a rate of return on the owner's investment.[247] This means that were AEC to purchase power from the applicant on a unit power basis, it would lose the benefits of the advantageous financing otherwise available to it for the capital costs attributable to its share of the plant. Due to its cheaper capital costs, primarily through the availability of low-cost loans, AEC could save approximately 7 mills per KWH through ownership access to Farley as opposed to unit power access.[248] It also has certain tax advantages over investor-owned utilities.

The availability of low cost loans to rural electric cooperatives such as AEC is not without good reason. Historically, these cooperatives were established to serve rural areas where the population is widely-dispersed and the customers have relatively low power demands. Consequently, they were faced with higher costs in bringing power to their customers in comparison to their investor-owned or municipal counterparts whose service areas were generally comprised of more densely populated areas.[249] Recognizing this factor, Congress enacted legislation to provide capital at low interest rates to enable electric cooperatives to provide service to its customers at rates comparable to those enjoyed by the others.[250]

In the circumstances of this case, we cannot perceive how a unit power arrangement would promote free competition, let alone "eliminate the concerns." Rather, a unit power arrangement would deprive AEC of its financing advantages — the very advantages Congress thought necessary for cooperatives such as AEC to operate effectively.

---

[247]See fn. 7, *supra*.

[248]By AEC's estimate, its cost of a Kw of power, if it owned 4% of the Farley plant, would amount to 18.9 mills under a joint ownership arrangement, while by the same estimate, applicant's cost of producing power at Farley — the unit power cost to AEC — was placed at 26.2 mills. Rogers, Tr. 27,459-62.

[249]As a result, rural rates for retail use of power historically have been higher than urban rates. St. John, Tr. 4654.

[250]Rural Electrification Act of 1936, 7 U.S.C. §§ 901 *et seq.* See also House Report No. 93-91, the House Committee report on the House version of the bill which became P.L. 93-32 establishing a Rural Electrification and Telephone Revolving Fund. U.S. Code Cong. and Admin. News, p. 1365 (1973).

In this regard, the Licensing Board concluded that a "consideration of AEC's tax and other advantages is irrelevant for all purposes under the facts of the instant case." The Board thereupon purported to adopt the Department's suggestion that "one takes his competition as he finds them."[251] Notwithstanding this pronouncement, the action of the Board in ordering unit power did not leave AEC in its normal competitive position; its real effect was to deprive AEC of its normal financing advantages in connection with the power it would obtain from the Farley plant. These tax and other financing advantages were accorded the cooperatives by the Congress as a matter of governmental policy.[252] Absent a showing that these advantages serve to operate in derogation of the antitrust laws and the policies underlying them, we know of no sound reason why we should act to keep AEC from enjoying them.[253]

Generally, the antitrust laws seek to prevent the unreasonable use of market power to gain additional market power.[254] In this case, it can be expected that the addition of Farley to the applicant's generating capacity will over the years increase applicant's existing market dominance. Thus, a key consideration here is the action we must take to forestall that expectation from becoming reality. We find that, of the types of arrangements for access to generating capacity generally found in the electric industry, ownership access is likely to be the most effective way of accomplishing this result, because this arrangement will enable AEC to compete more effectively. As a part-owner, AEC will be able to take advantage of the lower interest and tax benefits available to it for financing its share of the plant which will, in turn, translate to lower costs for its share of the output from Farley. In the words of one witness, "there is a very substantial and meaningful difference between Alabama Power Company's costs and AEC's costs on an ownership basis, no matter whose figures you use."[255] And this observation should hold relatively true even if all parties' costs increase with time.[256]

We thus render explicit that which implicitly follows from the considerations we have just outlined: No less than a proportionate sharing of the ownership of the Farley plant by the applicant and AEC will suffice to accommodate the objectives of strengthening free competition in private

---

[251] 5 NRC at 1497.

[252] *Midland, supra*, 6 NRC at 1019.

[253] We note in passing that the applicant enjoys special privileges accorded by other governmental entities, and is protected against competition from REA cooperatives in much if not most of its service territory.

[254] See, *e.g., United States* v. *Griffith*, 334 U.S. 100, 107-08 (1948).

[255] Rogers, Tr. 27,461.

[256] *Ibid.*

enterprise and eliminating the concerns which arise from our adverse antitrust findings related to the applicant's past conduct.[257]

3. **Public Interest Considerations.** In exercising our judgment in the foregoing respect, we have not overlooked the public interest factors with which the Licensing Board found the antitrust values must be harmonized. We agree with that Board's finding of the need for power[258] and the concomitant decision not to withhold the issuance of a license to the applicant for the construction and operation of the plant. But as regards the other public interest factors considered by the Licensing Board, we do not find cause to follow its lead.

One of these public interest considerations related, in the words of the Licensing Board, to the "grandfathered" nature of the antitrust review.[259] The Licensing Board noted that the applicant had filed its original application for a construction permit on October 10, 1969, and an amendment for authority to construct a second unit on June 26, 1970, both prior to the December 1970 amendments to Section 105c. Notice of the antitrust hearing was not issued by the Commission until June 28, 1972. The Licensing Board found equities flowing to the applicant from this sequence of events.

We fail to find in the "grandfathered" situation any justification for striving to achieve in any less than full measure the antitrust goals embedded in the Atomic Energy Act. Even though the license applications were filed prior to the enactment in 1970 of the current antitrust review provisions found in Section 105c, applicant must be presumed to have known that the antitrust laws would apply to their fullest to any license issued by the Commission. Section 105a of the Act, which was unaffected by the 1970 amendments, made this clear. Indeed, concern with the competitive aspects of licensing in the nuclear area went back to the original atomic energy legislation enacted in 1946.[260] In these circum-

---

[257]Of course, these same reasons cause us to reject out-of-hand applicant's argument that the remedy need only be the sale of wholesale power.

[258]5 NRC at 1500.

[259]5 NRC at 1498.

[260]Section 7(c) of the Atomic Energy Act of 1946 formerly provided that:

> Where activities under any license might serve to maintain or to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the Commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General, may determine. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of fissionable material or atomic energy which appears to have these results.

stances, we discount this "grandfather" situation as a mitigating factor in our decision.

We also depart from the Licensing Board's consideration of the "alleged cessation of anticompetitive conduct as a mitigating factor."[261] According to the Board, "[t]here is no evidence that established conduct inconsistent with the antitrust laws beyond early 1972."[262] This observation is not altogether true. In at least one instance, the applicant's anticompetitive behavior extended until 1976, when it finally agreed to remove Section 4.2 from its contract with SEPA.[263] That provision, which in essence required SEPA's preference customers to purchase all of their supplemental power needs from the applicant, had been held by the Board to be anticompetitive.[264]

But an even more fundamental reason exists for our position. The fact that a transgressor has ceased its anticompetitive activity, especially when such cessation occurs after the onset of legal action,[265] in and of itself provides no justification for dispensing with otherwise appropriate remedial requirements. As the Supreme Court admonished in *United States* v. *Oregon State Medical Society*:

> It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

343 U.S. 326, 333 (1952).

4. **Basis for Allocation.** Our decision calling for a proportionate ownership of Farley by AEC brings up the matter of how its share should be determined. The Licensing Board had devised an allocation formula, albeit in terms of unit power shares, "based on a ratio of (a) the aggregate coincident demand of all wholesale-for-resale members of AEC in Alabama *during the hour of peak demand on the electric system of [the applicant]* in 1976 to (b) the sum of such coincident demands of AEC and the territorial peak-hour demands of [the applicant] (excluding therefrom the peak-hour demands imposed by members of AEC upon the electric system of [the applicant], *during the hour of peak demand on [the applicant's] electric system in 1976.*" (Emphasis added.)[266]

---

[261]5 NRC at 1500-1501.
[262]*Id.* at 1501.
[263]Stipulation by parties, Tr. 28,317-19.
[264]5 NRC at 933-37.
[265]As noted above, the notice of hearing was issued in mid-1972; the trial commenced in December 1974.
[266]5 NRC at 1507.

AEC accepts that "participation should be on the basis of the proportion of AEC's on- and off-system wholesale loads in central and southern Alabama to the total loads of both parties in such area."[267] However, it points out that the peak demands for each of AEC's on-system and off-system members and for applicant do not occur simultaneously.[268] The result of the Licensing Board's allocation formula, says AEC, enables the applicant to retain a disproportionate share of the facility.[269] AEC suggests instead that the ratio should be pegged to the load of AEC's on-system and off-system members and of the applicant *at the time of their respective peak loads.*

We agree with this position of AEC. Basing the allocation formula on the time of applicant's peak demand skews the result in its favor. A more equitable division of ownership would result if the shares were to be determined by the respective peak demands of AEC and the applicant occurring during 1976. The license condition we impose is based accordingly.

5. **Access to Transmission Services.** This brings us to the second of the license conditions we have determined are necessary in the circumstances of this case. It is evident that AEC needs access to the applicant's transmission system to make effective use of its share of the output from Farley.[270] It needs these services to transmit the power both to AEC's on-system and off-system members. Because AEC's on-system members are not interconnected directly to the off-system members, AEC also needs transmission services from its on-system members to its off-system members. But the need by AEC for transmission services is not limited to the power from Farley. To enable AEC to plan for and use in the most efficient manner all of the power to which it may have access — whether by self-generation or by purchase — it needs the transmission services of the applicant.[271] Without access to these transmission services, AEC's system would be an island to itself, isolated from other power sources or systems. Indeed, because it is not interconnected with all of its members, AEC is even now dependent on the applicant to bring power to AEC's off-system members.

AEC must have access to other sources of wholesale power as well as markets for any excess power it may have. The applicant enjoys such access through its interconnections with the Southern pool and, through that pool, with other nearby utilities. Through this access, the applicant is in a

[267] AEC Brief, 69.
[268] *Ibid.*
[269] *Ibid.*
[270] Rogers, Tr. 27,357.
[271] *Ibid.*

position to coordinate the various factors of production to produce, buy or sell reliable firm wholesale power under optimum conditions. Without equivalent access AEC would be unable to utilize fully its share of the power from Farley, hindering its ability to compete effectively against the applicant. Such a situation is unlikely to lead to a significant attenuation of the applicant's dominant position in central and southern Alabama, let alone strengthen free competition in private enterprise.

6. **MEUA's Remedy.** Our dissatisfaction with some of the Licensing Board's findings relating to MEUA perforce required us to reexamine the decision below to deny MEUA any remedy in this proceeding. As mentioned earlier, that decision was based on a finding that "there is no significant actual or prospective competition between [MEUA and applicant] at the retail distribution level,"[272] a finding we cannot accept. (See pp. 1060-1066, *supra*). Our disagreement with the decision below also presents us with an apparent due process problem: because the Licensing Board determined that MEUA was not entitled to any remedy, it excluded MEUA from offering evidence at the Phase II remedy hearing.[273]

In the circumstances, we could remand the case to the Licensing Board to allow MEUA an opportunity to present evidence on the subject of remedy. We do not, however, believe such a course is either necessary or desirable. In the first place, our views on remedy are shaped largely by our findings concerning the "situation inconsistent." Defining that situation was the purpose of the Phase I hearing, a phase in which MEUA participated actively. Second, MEUA was allowed to and did make an offer of proof at the Phase II hearing. We have carefully reviewed the offer[274] and find nothing therein which would, if developed more fully, cause us to change our opinion on remedy.

As we have said, our choice of remedy is dependent on the situation inconsistent with the antitrust laws. We think it important to place that situation as it affects MEUA in its proper perspective. We have found that MEUA and applicant compete at retail. We have found that applicant, by virtue of its dominant control of generation and transmission facilities in central and southern Alabama, has monopoly power in the retail market. And we have found that applicant has placed anticompetitive restrictions on MEUA's right to pursue other bulk power supply options.

On the other hand, we have found many of MEUA's allegations unsubstantiated by the evidence. In particular, we believe MEUA's role in the wholesale market is that of a buyer, and not in any real sense of a

---

[272]5 NRC at 961.
[273]Tr. 27,189; 27,204.
[274]Tr. 27,437 - 27,445.

potential seller. We do not believe anticompetitive contractual restrictions have played a large part in MEUA's failure to develop other bulk power supply alternatives; we think MEUA would have continued as a wholesale customer of applicant regardless of the restrictions. Finally, we see no evidence that MEUA has been harmed in its retail role by any anticompetitive behavior on the part of applicant or that applicant has wrongfully attempted to limit MEUA'S retail business. The evidence shows that applicant has monopolized the wholesale market; it does not show that the applicant has unlawfully monopolized the retail market or sought to do so.

In sum, our analysis of the situation relative to MEUA finds it limited to the restrictions placed on MEUA's ability to look elsewhere than to the applicant for sources of bulk power. MEUA is plainly entitled to a remedy that eliminates these restrictions. This includes both the removal of any offensive contractual provisions still in force between applicant and any member of MEUA and the use of applicant's transmission facilities (where available and with appropriate compensation) to enable MEUA to deal with other suppliers of bulk power.

In terms of access to the Farley nuclear facilities, we do not believe ownership access is warranted in the case of MEUA. MEUA has been able to compete effectively in the retail market in the past; we see no indication that an ownership interest is necessary to pry open the market. Nor is ownership access necessary to remedy the contractual limitations placed on MEUA's right to look for alternative suppliers. The municipals have purchased all their power requirements for decades; assuming power from Farley is fairly included in applicant's wholesale power mix, we fail to see how the nuclear facility will change in any way the situation at retail between applicant and MEUA. MEUA is entitled to enjoy any benefits of lower-cost nuclear power, but should be able to do so (and remain competitive) through the purchase of wholesale power from the applicant.[275]

Nothing in this decision, of course, prevents applicant from selling unit power or a portion of the Farley facilities to MEUA if the two parties so desire. We merely hold today that, in the circumstances of this case, where the two parties have fairly competed at retail for many years and where the Farley facilities will not impede MEUA's ability to continue doing so, the elimination of the situation in the retail market that is inconsistent with the antitrust laws can be accomplished without awarding the municipals the right to purchase a share of the Farley plant.

---

[275]See excerpts from the legislative history of Section 105c at 5 NRC at 1491-96.

CONCLUSION

The conditions appended to this decision shall be incorporated in the applicant's licenses in lieu of the present antitrust conditions; all exceptions not addressed herein have either been denied or found immaterial to our decision; the Licensing Board's decision is *modified* in accordance with the foregoing opinion and is *affirmed as modified.*

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

APPENDIX

License Conditions Approved by the Appeal Board

The following license conditions are made a part of any licenses issued to the applicant for the Joseph M. Farley Nuclear Plant, Units 1 and 2:

1. Licensee shall recognize and accord to Alabama Electric Cooperative the status of a competing electric utility in central and southern Alabama.

2. Licensee shall offer to sell to AEC an undivided ownership interest in Units 1 and 2 of the Farley Nuclear Plant. The percentage of ownership interest to be so offered shall be an amount based on the relative sizes of the respective peak loads of AEC and the Licensee (excluding from the Licensee's peak load that amount imposed by members of AEC upon the electric system of the Licensee) occurring in 1976. The price to be paid by AEC for its proportionate share of Units 1 and 2, determined in accordance with the foregoing formula, will be established by the parties through good faith negotiations. The price shall be sufficient to fairly reimburse Licensee for the proportionate share of its total costs related to the Units 1 and 2 including, but not limited to, all costs of construction, installation, ownership and licensing, as of a date, to be agreed to by the two parties, which fairly accommodates both their respective interests. The offer by Licensee to sell an undivided ownership interest in Units 1 and 2 may be conditioned, at Licensee's option, on the agreement by AEC to waive any right of partition of the Farley plant and to avoid interference in the day-to-day operation of the plant.

3. Licensee will provide, under contractual arrangements between Licensee and AEC, transmission services via its electric system (a) from AEC's electric system to AEC'S off-system members; and (b) to AEC'S electric system from electric systems other than Licensee's, and from AEC'S electric system to electric systems other than Licensee's. The contractual arrangements covering such transmission services shall embrace rates and charges reflecting conventional accounting and ratemaking concepts followed by the Federal Energy Regulatory Commission (or its successor in function) in testing the reasonableness of rates and charges for transmission services. Such contractual arrangements shall contain provisions protecting Licensee against economic detriment resulting from transmission line or transmission losses associated therewith.

4. Licensee shall furnish such other bulk power supply services as are reasonably available from its system.

5. Licensee shall enter into appropriate contractual arrangements amending the 1972 Interconnection Agreement as last amended to provide for a reserve sharing arrangement between Licensee and AEC under which

the Licensee will provide reserve generating capacity in accordance with practices applicable to its responsibility to the operating companies of the Southern Company System. AEC shall maintain a minimum level expressed as a percentage of coincident peak one-hour kilowatt load equal to the percent reserve level similarly expressed for Licensee as determined by the Southern Company System under its minimum reserve criterion then in effect. Licensee shall provide to AEC such data as needed from time to time to demonstrate the basis for the need for such minimum reserve level.

6. Licensee shall refrain from taking any steps, including but not limited to the adoption of restrictive provisions in rate filings or negotiated contracts for the sale of wholesale power, that serve to prevent any entity or group of entities engaged in the retail sale of firm electric power from fulfilling all or part of their bulk power requirements through self-generation or through purchases from some source other than licensee. Licensee shall further, upon request and subject to reasonable terms and conditions, sell partial requirements power to any such entity. Nothing in this paragraph shall be construed as preventing applicant from taking reasonable steps, in accord with general practice in the industry, to ensure that the reliability of its system is not endangered by any action called for herein.

7. Licensee shall engage in wheeling for and at the request of any municipally-owned distribution system:

(1) of electric energy from delivery points of licensee to said distribution system(s); and

(2) of power generated by or available to a distribution system as a result of its ownership or entitlement* in generating facilities, to delivery points of licensee designated by the distribution system.

Such wheeling services shall be available with respect to any unused capacity on the transmission lines of licensee, the use of which will not jeopardize licensee's system. The contractual arrangements covering such wheeling services shall be determined in accordance with the principles set forth in Condition (3) herein.

The Licensee shall make reasonable provisions for disclosed transmission requirements of any distribution system(s) in planning future transmission. By "disclosed" is meant the giving of reasonable advance notification of future requirements by said distribution system(s) utilizing wheeling services to be made available by Licensee.

---

*"Entitlement" includes but is not limited to power made available to an entity pursuant to an exchange agreement.

8. The foregoing conditions shall be implemented in a manner consistent with the provisions of the Federal Power Act and the Alabama Public Utility laws and regulations thereunder and all rates, charges, services or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them.

APPENDIX D

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Michael L. Glaser, Chairman
Marshall E. Miller
Kenneth G. Elzinga

In the Matter of

Docket Nos. 50-348A
50-364A

ALABAMA POWER COMPANY
(Joseph M. Farley Nuclear Plant,
Units 1 and 2)

April 8, 1977

TABLE OF CONTENTS

This proceeding arises under Section 105c of the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2135(c) (1970), to determine whether the activities under licenses for the Joseph M. Farley Nuclear Plant, Units 1 and 2, would create or maintain a situation inconsistent with specified antitrust laws of the United States.

This Atomic Safety and Licensing Board (Board) concludes, on the basis of the evidence of record and findings of fact set forth in this decision, that the activities under the licenses for the Joseph M. Farley Nuclear Plant, Units 1 and 2, would create or maintain a situation inconsistent with the antitrust laws and the policies underlying those laws. We further conclude that certain relief is necessary, and accordingly, that further proceedings must be promptly held to specify the exact nature of the relief.

I. BACKGROUND OF THIS PROCEEDING

On October 10, 1969, Alabama Power Company (Applicant) filed with the Atomic Energy Commission (Commission), pursuant to Section 104 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2134, an application for a construction permit for a nuclear generating facility to be located in Houston County, Alabama. The application requested authority to construct a pressurized water nuclear reactor designed to operate initially at power levels of 807 megawatts electric, and ultimately, at 844 megawatts electric. On June 26, 1970, Applicant filed an amendment to its application which requested authority to construct and operate a second, identical nuclear generating facility at the same location. These proposed nuclear facilities were orginally designated the Southeast Alabama Nuclear Plant, but later were renamed the Joseph M. Farley Nuclear Plant, Units 1 and 2.

Following amendments to the Atomic Energy Act in December 1970, the Department of Justice (Department), pursuant to Section 105c(1) of the Atomic Energy Act, advised the Commission, in a letter dated August 16, 1971, that a hearing should be held to consider whether the activities of Applicant under the licenses for the Joseph M. Farley Nuclear Plant would create or maintain a situation inconsistent with the antitrust laws.

In accordance with required procedures, the Commission published the Department's letter of advice, and gave notice that petitions for leave to intervene and requests for a hearing on the antitrust aspects of the applications for the Joseph M. Farley Nuclear Plant should be filed within thirty days. On September 21, 1971, Alabama Electric Cooperative (AEC), petitioned for leave to intervene in connection with these applications and requested a hearing. Applicant opposed AEC's petition. On February 23, 1972, the Municipal Electric Utility Association of Alabama (MEUA) also petitioned for leave to intervene and requested a hearing. Applicant opposed this petition and request for hearing as well.

On June 28, 1972, the Commission issued a Notice of Antitrust Hearing on Applicant's applications for the Farley Nuclear Plant. The Commission appoint-

ed this Board[1] and directed that the Board rule on the pending petitions for leave to intervene.

On July 21, 1972, this Board issued a Notice and Order for a prehearing conference to be held on September 27, 1972. On that date, a prehearing conference was held, and after oral argument, this Board granted petitions for leave to intervene of AEC and MEUA. The Attorney General of the United States, through the Antitrust Division of the Department of Justice, and the Staff (Staff) of the Nuclear Regulatory Commission (Commission)[2] are statutory parties to this proceeding. The Board also heard argument on Applicant's motion to limit the scope of antitrust review in this proceeding.

Subsequently, on December 4, 1972, we issued a Notice and Order for a second prehearing conference to hear oral argument on Applicant's motion to limit the scope of this proceeding and on a motion by the Department to consolidate this proceeding with the applications of Georgia Power Hatch, Units 1 and 2, which had also been noticed for antitrust review. We held a second prehearing conference on December 11, 1972, at which time we heard oral argument on the aforementioned motions.

On January 24, 1973, we denied the Department's motion to consolidate, for antitrust review, Applicant's applications for the Farley units with the applications of Georgia Power Company for the George I. Hatch Nuclear Power Plant.

On February 9, 1973, this Board issued its Memorandum and Order denying Applicant's motion to limit the scope of this proceeding, and on the same day we issued our prehearing conference order regarding issues and procedures to be followed in this proceeding. We tentatively specified in that prehearing conference order the issues to be tried in this proceeding, and established procedures for discovery to be followed by the parties.

We held a further prehearing conference on March 20 and March 21, 1973, to consider the appropriate scope of the proceeding, discovery and proposed issues to be tried. On April 26, 1973, we issued another prehearing conference order which reviewed the actions taken at our prehearing conference of March 20 and March 21, 1973. We also set forth a statement of the issues and subissues to be tried. We ordered that discovery proceed, and directed the parties to file periodic reports with the Board describing the status and progress of discovery.

---

[1] The Commission appointed the Honorable Walter W. K. Bennett, Carl W. Schwarz, Esq., and Michael L. Glaser, Esq., as members of the Board. Subsequently, the composition of the Board was reconstituted to designate Michael L. Glaser Chairman, Carl Schwarz and Dr. Kenneth G. Elzinga as members. After evidentiary hearing began, the membership of the Board was further reconstituted to name Marshall E. Miller as a member of the Board replacing Carl W. Schwarz.

[2] On October 11, 1974, the Energy Reorganization Act (P.L. 93-438) was enacted. Pursuant to the Act, the regulatory and licensing functions of the Atomic Energy Commission were transferred to the new Nuclear Regulatory Commission on January 19, 1975.

A final prehearing conference was held on September 24, 1973, to consider various matters involved in discovery, and to establish a tentative schedule for commencement of evidentiary hearing. Subsequently, we issued a prehearing conference order ruling on various discovery matters and setting forth the tentative date for commencement of evidentiary hearing.

Thereafter, Applicant filed a motion to bifurcate this proceeding. Applicant sought the first phase to be concerned only with a determination of whether the activities under the licenses for the Farley Plant would create or maintain a situation inconsistent with the antitrust laws, and requested a second phase, in the event we found inconsistencies, to deal with the appropriate remedy or relief in terms of conditions to be placed on the licenses for the Farley Units. We held oral argument on Applicant's motion on May 15, 1974, and issued a brief order on May 23, 1974, granting Applicant's motion. We issued a Memorandum and Order on September 3, 1974, setting forth our reasons for granting Applicant's motion, and designating the conditions under which the bifurcated hearing would be held.

On December 4, 1974, the evidentiary hearing began. Hearings were continued from that date. The final evidentiary session was held on April 9, 1976. On April 26, 1976, we closed the record in the first phase of this proceeding and directed the parties to file proposed findings of fact and conclusions of law by June 30, 1976, and replies, if desired, by August 16, 1976. All parties timely filed proposed findings of fact and conclusions of law, and reply findings.

Because of the nature of this proceeding and the complexity of the issues, we ordered that oral argument be held on November 22, 1976.

During the course of this proceeding, the former Atomic Energy Commission, on August 15, 1972, issued construction permits for Applicant's Farley Nuclear Plant, Units 1 and 2. The construction permits were issued subject to the outcome of this proceeding. The permits recited that they were granted without prejudice to any subsequent licensing action, including the imposition of appropriate conditions which the Commission might make after the conclusion of this case.

The Department proposed that Applicant be required, as a condition of the licenses of the Farley Units, to: (1) grant equal participation (ownership or unit power purchase) in both Units and all future nuclear units installed by Applicant for the term of the Farley licenses; (2) sell bulk power at wholesale for resale to any person engaging or proposing to engage in the sale of electric power at retail; (3) interconnect and share reserves with any electric utility in its area engaging or proposing to engage in the generation and transmission of electric power, on fair reserve-sharing principles equivalent essentially to those required by the Federal Power Commission in the *Gainesville*[3] decision; (4) engage in coordi-

[3] *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515 (1971).

nated development with any electric utility or group of electric utilities engaging in or proposing to engage in bulk power supply with which Applicant is or may feasibly be interconnected by incorporating the load requirements of such utility or utilities into the load requirement of Applicant and cooperating in planning and constructing large base-load units to satisfy the pooled load growth requirement, and to provide for reasonable charges, the transmission services associated with such coordinated development: (5) provide wheeling services so that independent electric systems in central and southern Alabama may coordinate among themselves and with other electric utilities located outside central and southern Alabama; (6) provide other coordinating arrangements, such as maintenance power and economy energy, on reasonable terms; and (7) advise each major neighboring utility and each smaller utility in central and southern Alabama that it will not directly or indirectly enter into, adhere to, continue, maintain, renew, enforce or claim any rights under any contract, agreement, understanding, joint plan or joint program with any other electric utility system to limit, allocate, restrict, divide, or assign, or to impose any limitation or restrictions respecting the persons to whom, or the market or territories in which any other electric utility may sell or supply firm power in bulk or power exchange services.

II. CONTENTIONS OF THE PARTIES

A. The Department

The Department contends that there is a situation inconsistent with the antitrust laws in central and southern Alabama. It asserts that Applicant has monopolized the wholesale-for-resale firm-power market in central and southern Alabama which has restricted competition in the retail distribution, firm-power market in the same area. The Department claims that the activities under the licenses would maintain and aggravate this situation because low cost, nuclear power to be supplied by the Farley Plant will actually strengthen and expand Applicant's electric system and increase Applicant's future ability to install and obtain low cost power from additional generating units.

More specifically, the Department contends that Applicant has illegally monopolized the wholesale-for-resale firm-power market in central and southern Alabama, and as a result, has monopolized the retail distribution, firm-power market in that same area, in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2. According to the Department, Applicant has monopoly power, the power to control prices and exclude competition in three relevant markets: (1) the retail distribution, firm-power market in which electric distribution systems supply firm power to consumers; (2) the wholesale-for-resale firm-power market in which producers of firm electric power in bulk furnish that power to

distribution systems; and (3) the regional power exchange market, in which producers of firm electric power engage in transactions with one another for the factors of production used in making bulk firm power.

The Department alleges that Applicant has misused its monopoly power to stifle competition and to maintain and enhance its market position. Thus, the Department claims that Applicant has attempted to prevent AEC from developing a bulk power supply for its member cooperatives by preventing AEC from installing generation. Moreover, the Department asserts that Applicant has maintained low wholesale rates for electric power in order to discourage its wholesale customers, including AEC, from developing and installing their own generation facilities.

The Department also states that Applicant misused its monopoly power in other instances. For example, the Department urges that Applicant refused to engage in coordination with AEC after completion of two of AEC's steam generating units in 1955, and later Applicant refused to offer AEC a fair coordination arrangement after AEC had constructed additional generating facilities in the 1960's. Finally, the Department claims Applicant has denied AEC access to the factors of production of firm electric power which takes place through power exchange services among electric utilities in the southeast region of the United States, by reason of the terms and conditions of an interconnection agreement between Applicant and AEC which was entered into in June 1972. The Department states that Applicant has denied AEC and municipally owned distribution systems in central and southern Alabama the opportunity to share ownership in the Farley Nuclear Plant.

The Department asserts that Applicant has also manifested its monopoly power in respect to its dealing with municipally owned distribution systems in central and southern Alabama. The Department points to Applicant's alleged refusal to consider coordination with the City of Dothan in the mid-1960's when the City was contemplating building a steam generating plant to supply its own power needs, instead of purchasing power from Applicant at wholesale. The Department says Applicant has included conditions in its contractual arrangements with municipally owned distribution systems which prohibit these systems from installing their own generation or from entering into agreements with other utilities for alternative sources of power. In this respect, the Department claims Applicant took steps to foreclose the development by others, including the Federal government through the Southeastern Power Administration, of hydroelectric generation sites along the rivers in Alabama. Applicant is purported to have offered special rate reductions to municipal and cooperative wholesale customers as a condition of Applicant's obtaining the rights to develop all the hydroelectric generating sites in Alabama.

The Department notes that Applicant controls virtually all high voltage transmission lines essential to the operation of an electric utility system in

central and southern Alabama. Applicant is alleged to have taken steps to prevent the Southeastern Power Administration (SEPA) from constructing its own transmission system to distribute and deliver power to preference customers from Federal hydroelectric projects in accordance with Section 5 of the Flood Control Acts of 1944, 16 U.S.C. 325s.

The Department further contends that Applicant, in conjunction with others, precluded small electric utility systems from regional economic coordination after the introduction in Congress of reliability legislation following the massive blackout in northeastern United States in late 1965. In this respect, the Department contends that Applicant and other utilities in the southeast region of the United States engaged in various types of economic coordination among themselves, and when the Southeastern Electric Reliability Council (SERC) was formed, took steps to insure that its purpose was limited to reliability and not economic coordination. Finally, the Department alleges that Applicant acquired a large part of its retail market by the acquisition of electric distribution systems over the years, and by limiting or preventing the construction of transmission lines by its competitors.

B. AEC

AEC makes these same contentions, but adds that Applicant has used the administrative and judicial processes against AEC to suppress AEC's efforts to acquire and expand its own generation and transmission facilities, and to eliminate or reduce competition from AEC in the wholesale-for-resale firm-power market. AEC claims that such activities on the part of Applicant are not constitutionally protected, and fall into a pattern evidencing a course of conduct inconsistent with the antitrust laws. AEC states that Applicant's uses of administrative and judicial processes against AEC demonstrate Applicant's purpose and intent to monopolize generation and transmission of electric power in central and southern Alabama.

C. MEUA

MEUA concurs in the Department's and AEC's contentions of conduct on the part of Applicant inconsistent with the antitrust laws, and also argues that Applicant has used its monopoly power to place the members of MEUA in a "price squeeze," in violation of the antitrust laws. In this regard, MEUA contends Applicant has adopted a policy of charging wholesale customers rates which do not allow them to compete with Applicant for a certain class of retail customer. In particular, MEUA charges that Applicant has adopted a policy of setting its retail rates to industrial customers at such a level that if a municipal system, which purchases its power from Applicant at Applicant's wholesale

rates, attempted to compete with Applicant for industrial customers, the municipality would have to sell at a loss. MEUA contends this policy results in a price squeeze designed to force the members of MEUA out of the retail market, and to insure that Applicant maintains its monopoly in this market.

D. Staff

The Staff is in accord with the contentions made by the Department, and further argues that Applicant's conduct and activities have created a situation inconsistent with Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, in that they represent unfair methods of competition. The Staff contends that Applicant presently dominates generation and transmission in central and southern Alabama, and uses and will continue to use this dominance to control the extent of competitive activity in that area if the Farley Units are licensed without conditions. The Staff states that ultimately competition will cease to exist in this area if Applicant is permitted to continue exercising monopoly power in the electric utility business in central and southern Alabama with sole access to nuclear power.

E. Applicant

Applicant vigorously denies the allegations and charges of the Department, AEC, MEUA and Staff. Moreover, Applicant claims it does not now and never has possessed monopoly power. Applicant asserts that it is subject to extensive regulation by both Federal and state authorities which precludes its ability to control prices or exclude competitors. In addition, Applicant argues that it is not subject to antitrust liability under the doctrine of *Parker* v. *Brown*, 317 U.S. 305 (1943), because the State of Alabama has adopted a pervasive system of regulation of electric utilities as a substitute for competition, and such regulation imposes a restraint which Applicant is lawfully compelled to observe. Specifically, Applicant states that the pervasive regulation and supervision by the Alabama Public Service Commission over Applicant's rates and practices, including the commencement and cessation of electric service, immunizes Applicant's activities from the reach of the antitrust laws.

Applicant also claims that its conduct has not been anticompetitive. Applicant says that its entire history, as well as the nature of the electric utility business, mandate a finding that the activities under the Farley licenses will not create or maintain a situation inconsistent with the antitrust laws. Applicant contends that it does not have a monopoly because, while it faces limited competition in the retail distribution, firm-power market regarded as a natural monopoly, it has vigorous competition in the wholesale-for-resale firm-power market. Applicant affirmatively argues that it has engaged in fair and reasonable

coordination with AEC, but that the type of coordination has necessarily been limited by deficiencies in AEC's electric system. Applicant points out that many of the events and occurrences cited by the Department and the other parties to this proceeding as evidence of Applicant's anticompetitive behavior, actually constitute fair and reasonable competition in the wholesale-for-resale power market. Applicant observes that the largest supplier of electric power in the wholesale market is the Tennessee Valley Authority (TVA) which has an overwhelming majority of sales and revenues in Alabama, thereby demonstrating Applicant's lack of monopoly power in the relevant market.

Applicant denies the existence of the so-called regional power exchange market described by the Department.

Applicant states that it has never refused to coordinate its electric system with AEC's system; or to wheel power as a part of such coordination, and indicates that it will do so on fair and reasonable terms as long as it is not subjecting itself to becoming a common carrier.

Finally, Applicant argues that it has been and is willing to negotiate with AEC and others for the purchase of unit power from the Farley Units, but that discussions among the parties never addressed this subject because of AEC's insistence on ownership shares in the Farley Plant.

III. THE PARTIES

A. Applicant

Applicant is a vertically and horizontally integrated electric utility engaging in generation, transmission and distribution of electricity in Alabama (APP. X, JMF-A, pp. 1-576; DJ 1,001, DJ 1,004).[4]

Applicant distributes electricity for consumption by residential, commercial and industrial users in 639 communities and rural areas in central and southern Alabama including users in the cities of Birmingham, Montgomery, Mobile,

[4] In this decision, the Board uses abbreviations in referring to exhibits, testimony, transcript citations, proposed findings of fact and conclusions of law, and briefs of the parties. The following abbreviations are used:

Applicant - APP.; Department of Justice - DJ; Alabama Electric Cooperative - AEC; Nuclear Regulatory Commission Staff - Staff; Municipal Electric Utility Association - MEUA; Proposed Findings of Fact and Conclusions of Law - PFF; Brief - Br; Transcript - Tr.; and Exhibits - X.

Where the decision refers to the written testimony of a witness, his name appears prior to the page citation of the testimony along with an indication of whether it is the witnesses' direct or rebuttal testimony. The Board has received certain written testimony of witnesses into evidence as exhibits, and has given the same an exhibit number or letter. In those instances where we refer to such testimony, the witnesses' name as well as the exhibit number or letter is cited.

Gadsden, Tuscaloosa, and Anniston (DJ 1,002). Central and south Alabama is that part of the state excluding the eleven most northern counties (DJ 1,006; DJ 1,007).

Applicant also provides electricity at wholesale to fifteen municipalities having their own electric distribution systems, eleven rural distribution cooperatives, and to AEC. All of these wholesale customers are located in central and southern Alabama (DJ 1,001, DJ 1,002, DJ 1,004, St. John, Direct, p. 4, Wein, Direct, p. 62).

Applicant owns and operates 8,057 miles of transmission and subtransmission lines (44 kilovolt to 230 kilovolt), 37,948 pole miles of lower voltage (13 kilovolt) overhead lines, and 817 miles of underground cable used in the distribution of electricity (DJ 1,004, DJ 1,005, APP. X 97, p. 442a-b). Applicant's electric facilities exist in all but the eleven most northern counties of Alabama, which are served by TVA (APP. X JMF-81, pp. 3, 11-14).

Applicant owns and operates 13 hydroelectric and six fossil-fired electric generating plants. These generating plants are:

	Capacity (Kilowatts)
Hydroelectric	
John Hillis Bankhead Hydro Plant	42,225
Walter Bouldin Dam	225,000[5]
H. Neely Henry Dam	72,900
Holt Hydro Plant	40,000
Jordan Dam	100,000
Lay Dam	177,000
Logan Martin Dam	128,250
Martin Dam	154,200
Mitchell Dam	72,500
Lewis Smith Dam	157,500
Thurlow Dam	50,000
Weiss Dam	87,750
Yates Dam	32,000
Total hydroelectric capacity	1,339,325
Fossil Fuel	
Ernest C. Gaston Unit No. 5	880,000
Barry Steam Plant (includes combustion turbine units)	1,583,500

[5] This hydroelectric facility was removed from service for an indefinite period in February 1975 due to a break in the dam. As of the close of the record in this proceeding, the Federal Power Commission was investigating the matter (APP. X FPC Form 1 for 1975, pp. 109(a), 112(c)).

Chickasaw Steam Plant	120,000
Gadsden Steam Plant	120,000
Gorgas Steam Plant	1,341,250
Greene County Steam Plant (60% share)	300,000
Demopolis Combustion Turbine Plant	48,860
Total fossil fuel capacity	4,393,610
Total hydroelectric and fossil fuel generating capacity	5,732,935
Ernest C. Gaston Steam Plant (50% share)[6]	509,840
Total owned capacity and one-half share of Gaston Steam Plant	6,242,775

Applicant plans the following additions to its generating facilities: (Miller, Direct, p. 14; Tr. 19,430)

	Date Planned In-Service	Capacity Kilowatts	Type Fuel
Joseph M. Farley Nuclear Plant – Unit No. 1	1977	860,000	Nuclear
– Unit No. 2	1979	860,000	Nuclear
James H. Miller, Jr., Steam Plant			
– Unit No. 1	1978	660,000	Coal
– Unit No. 2	1980	660,000	Coal
– Unit No. 3	1981	660,000	Coal

Applicant also plans to construct a new 135 megawatt hydroelectric plant on the Tallapoosa River in Randolph and Clay Counties, Alabama. This plant is scheduled for operation in 1980.

Applicant has applications pending before this Commission for authorization to construct four 1,200 megawatt nuclear power units at its Alan R. Barton Nuclear Plant site. At the present time, Applicant has deferred the construction

[6] This facility is owned by Southern Electric Generating Company (SEGCO) which owns and operates four units at the Gaston Steam Plant. This plant is a coal fuel plant with a total capacity in excess of 1,000,000 kilowatts of installed capacity (APP. X JHM-A, p. 63). The capacity in this plant is sold in equal shares by SEGCO to its two owners, Applicant and Georgia Power Company which each own one-half of SEGCO in common stock (APP. X 97; APP. X JHM-A, p. 63).

of these facilities because of economic conditions (Tr. 22,293-22,300; Statement of Applicant's counsel Tr. 25,549-25,557). In addition, Applicant plans to increase the capacity of its Mitchell Dam and Martin Dam hydroelectric generating plants by 80 and 60 megawatts, respectively, in the early 1980's (APP. X JHM-A, pp. 14-15).

Applicant's electric system experiences its peak demand during the summer months. In July 1974, Applicant's summer peak demand was 5,381 megawatts. Applicant's installed generating capacity at that time was 6,246 megawatts (APP. X 97, p. 431; APP. X JHM-A, p. 12). In August 1975, Applicant reported a peak demand of 5,508 megawatts. Applicant's installed generating capacity at this time was 6,021 megawatts (APP. X JHM-A, p. 12; APP. X FPC Form 1, 1975, p. 431, p. 112 (c)).

Over the years, Applicant has grown through a series of mergers with, and acquisitions and consolidations of other electric and public utility companies (APP. X JMF-A, pp. 28-45, 54-57, 79-80, 86-91, 93-98; DJ 601). The Board does not consider these mergers, acquisitions and consolidations, and the facts surrounding them, to be of decisional significance in this proceeding because of their remoteness and because they were consistent with industry practices and requirements at the time and not contrary to antitrust policy as then understood.

As of December 31, 1974, Applicant's total utility plant investments approximated $2.515 billion and its total assets equaled $2.332 billion. Applicant's total electric operating revenues approximated $489 million by the end of 1974 (APP. X 97, pp. 110, 114; DJ 1,003, p. 34).

Applicant is a wholly owned subsidiary of the Southern Company, a registered public utility holding company formed in 1947 under the Public Utility Holding Act, 15 U.S.C. 79 (APP. X JMF-A, pp. 484-486; APP. X 97). The Southern Company owns all the outstanding share of common stock of Applicant, as well as of Georgia Power Company, Gulf Power Company and Mississippi Power Company. These four companies comprise the operating companies of the Southern Company (APP. X JMF-A, pp. 484-486).

The Southern Company also owns all of the shares of Southern Services, Inc. (Southern Services), a service company which provides services to the four operating companies of the Southern Company in respect to power pooling, central dispatching, negotiation and administration of power sales and purchase agreements, and executive advisory services with regard to design and engineering, power purchasing, accounting, financing, and rate making (DJ 1,002, p. 11, Tr. 25,989-25,992).

Southern Services also acts as an agent for the four operating companies in connection with coordination of their electric generation and transmission facilities, and in regard to their operation with interconnected utilities (Tr. 25,989-25,992).

Applicant is involved in ownership of generation and transmission facilities with other operating companies of the Southern Company. Applicant and Georgia Power Company each own one-half of the common stock of SEGCO which owns the steam electric generating plant in Shelby County, Alabama (APP. X JMF-A, p. 268-269). SEGCO owns the Ernest C. Gaston Steam Plant which has an installed capacity of 1,019.68 megawatts. The plant has four steam units with a rated capacity of 250 megawatts each, and one combustion turbine unit which has a capacity of 19.68 megawatts (APP. X JHM-A, p. 13; APP. X JMF-A, p. 268-270).

Applicant also owns 60% of the Green County Generating Station near Demopolis, Alabama, as tenants-in-common with Mississippi Power Company, which owns 40%. This generating facility has an installed capacity of 500 megawatts, and is operated as a joint venture (APP. X JHM-A, p. 13; APP. X JMF-A, pp. 274-275, 306).

In 1974, Applicant generated 24,319,541 megawatt hours (MWH), purchased 3,115,771 MWH, and netted 852 MWH on interchanges with other utilities. In the same year, Applicant netted 21,584 MWH on wheeling for others. Applicant thus had a total of 27,457,748 MWH available for sale to wholesale and retail customers (APP. X 97, p. 431). At the end of 1975, Applicant reported it had generated 25,898,026 MWH, purchased 1,878 MWH, netted 10,576 MWH on interchanges, and netted 23,518 MWH on wheeling for others, for a total of 27,810,140 MWH (APP. X FPC Form 1, p. 431).

Over the years, Applicant has had a fairly constant load growth of about 8% per year. In the last several years, however, energy has grown only at about 1% and demand has grown about 6% per year (Tr. 22,507).

B. Alabama Electric Cooperative (AEC)

AEC is a nonprofit electric generation and transmission cooperative which is organized under Title 18 of the Code of Alabama.[7] AEC is owned, controlled and operated by its members as a generation and transmission agent. AEC is governed by a board of trustees which is composed of two representatives from each of its members. AEC was formed in 1941, and as a generation and transmission agent for its members, holds itself out to furnish directly the power needs of its membership to the extent that it can physically and economically do so. AEC's members in Alabama receive their electric service physically either from AEC or from Applicant. AEC is not restricted to service inside Alabama, and has two member cooperatives located in northwest Florida. These two Florida cooperatives also receive service physically from Gulf Power Company (AEC X 3,

[7] Title 18, Code of Alabama, 1940 (Recomp. 1958).

(Lowman) pp. 2-4; AEC X CRL-1A, p. 23; Tr. 9,223; 9,272-9,275; 9,281; DJ 1,006). AEC is unregulated.

AEC's members include 14 rural electric cooperatives, four municipally owned electric distribution systems, and two industrial mills. The member cooperatives are Baldwin County Electric Membership Cooperative, Central Alabama Electric Cooperative, Clarke-Washington Electric Membership Cooperative, Coosa Valley Electric Cooperative, Dixie Electric Cooperative, Pea River Electric Cooperative, Pioneer Electric Cooperative, South Alabama Electric Cooperative, Covington Electric Cooperative, Southern Pine Electric Cooperative, Tallapoosa Electric Cooperative, Wiregrass Electric, all of which are in Alabama, and two members in northwest Florida, Gulf Coast Electric Cooperative, Inc., and Choctawhatchee Electric Cooperative, Inc. The four municipal electric system members of AEC are the cities of Andalusia, Brundidge, Elba and Opp. The two industrial members of AEC are Micolas Cotton Mills and Opp Cotton Mills (AEC X 3, (Lowman) pp. 3-4).

There are two other rural distribution electric cooperatives in central and southern Alabama, but they are not members of AEC. These two cooperatives are Black Warrior Electric Membership Cooperative and Tombigbee Electric Cooperative, Inc. (AEC X CRL-1, AEC X CRL-1A).

AEC physically delivers all of the bulk power supply requirements to three of its fourteen member cooperatives, to its four municipal members, and to its two industrial members, by its own transmission facilities (AEC X 3, (Lowman) pp. 2-6, AEC X CRL-1, AEC X CRL-1A).

The three cooperative members for whom AEC furnishes directly all of the power requirements are Covington Electric Cooperative at 15 delivery points, South Alabama Electric Cooperative at seven delivery points, and Southern Pine Electric Cooperative at six delivery points (AEC X 3, (Lowman) pp. 2-6).

AEC furnishes a portion of the power requirements of Baldwin County Electric Membership Corporation at one delivery point, of the Clarke-Washington Electric Membership Corporation at six delivery points, of the Pea River Electric Cooperative at eight delivery points, of Wiregrass Electric Cooperative at three delivery points, and of the Choctawhatchee Electric Cooperative at nine delivery points.

Those members of AEC in Alabama which are served with part of their requirements by AEC have their remaining requirements furnished by direct physical connection with Applicant. Applicant furnishes power to Baldwin County Electric Membership Corporation at six delivery points, to the Clarke-Washington Electric Membership Corporation at five delivery points, to the Pea River Electric Cooperative at four delivery points, and to the Wiregrass Electric Cooperative at seven delivery points. Gulf Power Company serves Choctawhatchee Electric Cooperative at three delivery points.

These members of AEC which take all or part of their power from AEC are

referred to in this decision as the "on-system" members (AEC X 3, AEC X CRL-1).

AEC lacks any direct physical access to five of its members in Alabama which presently receive all of their power physically from Applicant, and to Gulf Coast Electric Cooperative, located in northwest Florida, which takes all of its power from Gulf Power Company (AEC X 3, (Lowman); AEC X CRL-1; AEC X CRL-1A; AEC X CRL-2, AEC X CRL-3).

AEC's members in Alabama with which it has no direct or physical connection are Coosa Valley Electric Cooperative, Central Alabama Electric Cooperative, Dixie Electric Cooperative, Pioneer Electric Cooperative and Tallopoosa Electric Cooperative. These entities receive all of their power from Applicant. Those systems which take all of their power requirements from Applicant or from Gulf Power Company are referred to in this decision as "off-system" members (AEC X 3, (Lowman) pp. 5-6; AEC X CRL-1, pp. 14-15; AEC X CRL-1A, pp.16-17; AEC X CRL-2; AEC X CRL-3).

AEC purchases 67 megawatts of dependable capacity and 50 megawatts of standby capacity from SEPA, which acts as the marketing agent of the Department of Interior in disposing of electricity generated by Federal hydroelectric projects constructed on rivers in the southeastern United States (DJ 401; AEC X CRL-1, CRL-1A).

AEC's generation resources include the following:

Facility	Capacity (Kilowatts)	Type
McWilliams (Nos. 1, 2 and 3)	45,000	Steam
Tombigbee (Jackson)	75,000	Steam
Point A Hydro	5,000	Hydroelectric
Gantt Hydro	42,000	Hydroelectric
Portland	10,000	Gas Turbine
Total	137,000	

AEC currently has under construction two coal-fired 210 megawatt generating units at its Tombigbee Plant site. The units are scheduled to begin operation in 1978 and in 1979 (Tr. 8,615-17; Tr. 26,362; Tr. 26,398-26,400; AEC X CRL-1A; APP. X, 146; DJ 1,006 at p. 11).

AEC does not have sufficient installed capacity to meet the requirements of its on-system members. Consequently, it serves its members not only from its own generating facilities, but also from power purchased from Applicant and from its SEPA allocation of power. In 1974, AEC generated 346,485,400 megawatt hours, purchased 552,995,521 megawatt hours from Applicant, and re-

ceived 67,867 megawatt hours from SEPA (AEC X 3, (Lowman) pp. 2-8; APP. X 146).

AEC has 995 miles of transmission and subtransmission lines, including 380 miles of 115 KV lines, 29 miles of 69 KV lines, and 586 miles of 46 KV lines. AEC's system is a summer peaking system. In the summer of 1974, AEC's peak demand was 217.8 megawatts (AEC X CRL-1A).

AEC's transmission system is interconnected at three points with Applicant's transmission system. AEC is also interconnected to the Walter F. George Federal hydroelectric facility. AEC purchased approximately 57% of its power requirements from Applicant in 1974 (AEC X 3, (Lowman) pp. 2-8; APP. X 146). AEC's principal source of capacity and energy is Applicant (APP. X 146, APP. X 306).

The members of AEC pool their power costs so that all members pay the same rate for bulk power, regardless of source. Thus, on-system and off-system members pay the same rate to AEC for bulk power, even though the off-system members in Alabama receive their bulk power supply directly from Applicant. Applicant delivers power to the off-system members and on-system members which take part of their power requirements from Applicant, and it bills AEC for the charges. AEC, in turn, bills each of its members for the bulk power delivered by Applicant at a rate higher than that which Applicant charges AEC. This surcharge and billing procedure is known as power pooling (AEC X 3, (Lowman) pp. 104-105; Tr. 7,151-7,155; Tr. 7,244-7,245; Tr. 20,476).

Applicant and AEC are the only entities engaged in the generation and transmission of electricity in central and southern Alabama.

C. Municipal Electric Utility Association of Alabama (MEUA)

MEUA is composed of 12 cities or municipal utility boards located in central and southern Alabama which own and operate municipal electric distribution systems. The cities and municipal utility boards who are members of MEUA are the City of Alexander City, the City of Dothan, the City of Fairhope, the Utility Board of the City of Foley (Riviera Utilities), the City of LaFayette, the City of Lanett, the City of Luverne, the City of Opelika, the City of Piedmont, the Utilities Board of the City of Sylacauga, the City of Troy, and the Utilities Board of the City of Tuskegee (St. John, Direct, p. 3).

None of the members of MEUA owns and operates any generating facilities. Except for Riviera Utilities and the City of Fairhope, none of the members of MEUA owns any transmission facilities. The Riviera Utilities and the City of Fairhope own and operate a total of 71 miles of 44 KV transmission lines (Porter, Direct, p. 13). All of the members of MEUA purchase most of their power supply from Applicant. They receive the rest from SEPA as preference

customers. The City of Troy purchases its entire bulk power supply from Applicant (St. John, Direct, p. 7; Porter, Direct, p. 15).

In Alabama, there are 22 municipalities located in central and southern Alabama which own and operate municipal electric distribution systems. As noted earlier, four of these municipalities (Andalusia, Brundidge, Elba and Opp) are members and wholesale customers of AEC. Of the other 18 municipally owned electric distribution systems, 15 systems purchase their entire power requirements (except for SEPA preference customer allocations amounting to approximately 44 megawatts) from Applicant. In addition to the 12 members of the MEUA, the cities of Fulton, Evergreen and Hartford, which are not members of MEUA, purchase bulk power from Applicant. The City of Robertsdale is supplied at wholesale by Riviera Utilities. The cities of Bessemer and Tarrant City, located near Birmingham, are served at wholesale by TVA, through an arrangement with Applicant which delivers power to them by displacement. The City of Robertsdale has recently entered into an agreement with Applicant to purchase power at wholesale from Applicant (St. John, Direct, p. 4; Crawford, Tr. 23,477-23,487).

IV. OTHER UTILITIES AND SOURCES OF ELECTRIC POWER IN THE SOUTHEAST

As indicated, Applicant is a member of the Southern Company which is comprised of the Georgia Power Company, the Gulf Power Company, the Mississippi Power Company, and Applicant. Applicant is bounded on three sides by one of its affiliates in the Southern Company system. Thus, Georgia Power Company bounds Applicant on the east, Gulf Power Company bounds Applicant on the south, and Mississippi Power Company bounds Applicant to the west. TVA is adjacent to Applicant on the north (DJ 1,008).

A. Georgia Power Company

Georgia Power Company (Georgia Power) is the largest operating company of the Southern Company. Georgia Power serves the entire State of Georgia except for a few northern counties which are served by TVA. In 1974, Georgia Power's peak demand was 8,936 mw (DJ 1,008; DJ 3,015; Schedule C, p. 2). As one of the Southern Company's operating companies, Georgia Power is physically interconnected with Applicant and Gulf Power Company (Gulf Power), another affiliated company of the Southern Company. Georgia Power also has physical interconnections with TVA, Duke Power Company (Duke), South Carolina Electric and Gas Company (SCEGC), and Florida Power Corporation (Florida Power) (DJ 3,003, DJ 3,004, DJ 3,007, DJ 3,008).

B. Mississippi Power Company

Mississippi Power Company (Mississippi Power), another member company of the Southern Company, operates in the southeastern part of Mississippi from the City of Meridian south to the Gulf Coast (DJ 1,008). Mississippi Power's projected peak demand for 1974 was 1,263 mw (DJ 3,015, Schedule C, p. 2). Mississippi Power is physically interconnected with Applicant. Mississippi Power also has physical interconnections with Mississippi Power and Light Company (MP&L) and Louisiana Power and Light Company (LP/L), both of which are operating subsidiaries of Middle South Utilities, Inc., a registered holding company under the public Utility Holding Company Act (DJ 1,008).

C. Gulf Power Company

Gulf Power Company (Gulf Power) is the smallest operating company of the Southern Company. It serves the western part of the Florida panhandle, including the cities of Pensacola and Panama City (DJ 1,008). Gulf Power's projected peak demand for 1974 was 1,141 mw (DJ 3,015, Schedule C, p. 2). As noted above, Gulf Power is physically interconnected with Applicant and Georgia Power. Gulf Power is also physically interconnected with Florida Power (DJ 1,008).

D. Tennessee Valley Authority

TVA is a corporate agency of the United States, created by the Tennessee Valley Authority Act of 1933, 16 U.S.C. 831-831dd. TVA is engaged in the generation, transmission and sale of electricity to municipally owned and cooperatively owned utilities in the Tennessee Valley, to other Federal government agencies and to industry in that area. TVA is the supplier of electricity in the State of Tennessee, but also serves parts of Kentucky, Mississippi, North Carolina, Georgia, Virginia, and the 11 most northern counties in Alabama. TVA also supplies power at wholesale to two municipal systems in central and south Alabama, Bessemer and Tarrant City (DJ 1,007).

Applicant has direct interconnections with TVA. TVA's service area is limited by the 1959 TVA Bond Act, 16 U.S.C.831, which prohibits the sale of electricity by TVA in areas not served by TVA on July 1, 1957.

Applicant has interchange agreements with TVA for various types of power and energy transactions, including emergency, economy, seasonal capacity and surplus capacity (DJ 3,007). Applicant also wheels power (by displacement) for TVA's wholesale customers, the City of Bessemer and Tarrant City (DJ 3,010).

TVA's peak demand occurs in the winter months whereas most electric utilities in the southeastern part of the United States have their peak demands

occurring in the summer months. This difference in seasonal peaks allows TVA and other electrical systems in the southeast to engage in an exchange of seasonal power (APP. X WRB-A, pp. 12-14). In 1974, Applicant and TVA engaged in an exchange of seasonal power due to the difference in times when each electric utility experienced its peak demands (APP. X 97, p. 424(c)).

E. Mississippi Power and Light Company

MP&L is an operating subsidiary of Middle South Utilities, Inc., a registered holding company under the Public Utility Holding Company Act. MP&L serves the western part of the State of Mississippi. MP&L is not directly interconnected with Applicant. However, MP&L is directly interconnected with Mississippi Power, one of Applicant's affiliates in Southern Company (DJ 1,008). Since 1953, Middle South Utilities,Inc., and the Southern Company have maintained a contractual relationship under which power exchange transactions such as emergency, economy, diversity, peaking capacity, and firm power mutually take place between their respective operating companies (DJ 3,002). MP&L engages in power exchange transactions with Applicant through this physical interconnection with Mississippi Power (DJ 3,002).

F. Duke Power Company

Duke Power is a vertically and horizontally integrated electric utility serving the central portion of North Carolina and the western portion of South Carolina. Applicant does not have a direct interconnection with Duke Power, but Georgia Power, Applicant's Southern Company affiliate, does. This interconnection permits Applicant to engage in power exchanges with Duke Power through the agency of Southern Service, Inc., an affiliated company of the Southern Company, which contracts on behalf of the Southern Company with Duke Power, as well as other utilities, for a variety of power exchanges (DJ 3,003). The power exchange arrangements between the Southern Companies and Duke Power include emergency, economy, energy, short-term, diversity, peaking capacity, seasonal capacity and purchases and sales of firm power (DJ 3,003).

G. South Carolina Electric and Gas Company

SCEGC is a vertically and horizontally integrated electric utility serving central, southern and southwestern South Carolina. SCEGC is not interconnected with Applicant, but is interconnected with Georgia Power. SCEGC has an interchange agreement with Southern Company for exchange of surplus energy, emergency service, and surplus spinning capacity, and engages in various power transactions with Applicant under this agreement (DJ 3,004).

H. Florida Power Corporation

Florida Power serves the central and western area of the Florida peninsula and eastern portions of the Florida panhandle. Florida Power is interconnected with Gulf Power and Georgia Power. Florida Power and the Southern Company have a contractual agreement for the exchange of emergency service, economy energy, seasonal capacity and short-term power exchanges, and sales and purchase of firm power (DJ 3,008). In the last few years, there has not been any exchange of seasonal capacity between Florida Power and Southern Company under this agreement, because Florida Power's load growth has required all of its generating capacity (APP. X WRB-A, pp. 12-14). Applicant has received and delivered power to Florida Power pursuant to the Southern Company agreement with Florida Power (DJ 3,008).

I. The Southeastern Power Administration (SEPA)

SEPA was established in 1950 as an agency of the United States Department of the Interior to carry out the functions assigned to the Secretary of the Interior by Section 5 of the Flood Control Act of 1944, 16 U.S.C. Section 825s (DJ 401). Section 5 of the Flood Control Act provides that surplus electric power and energy generated at Federal hydroelectric power projects under the control of the United States Army Corps of Engineers must be delivered to the Secretary of the Interior who is charged with the responsibility of transmitting and disposing of such power and energy. Section 5 of the Act further directs the Secretary to give a preference in the sale of such power and energy to public bodies and cooperatives (DJ 3,012, pp. 1-2; Tr. 14,688-14,692; Tr. 14,694-14,696).

SEPA, however, is not a public utility. SEPA's function is limited to marketing surplus power made available to it by the Corps of Engineers from Federal hydroelectric projects. SEPA has no transmission system and is therefore dependent upon operating electric utilities for delivery of power which the Secretary of the Interior disposes of pursuant to Section 5 of the Flood Control Act (Tr. 15,175-15,189; Tr. 15,199-15,203; Tr. 15,219; DJ 1,008).

SEPA markets power and energy from 20 hydroelectric projects in ten southeastern states (Tr. 14,689). SEPA will have additional power to market in the future from new Federal hydroelectric projects as they are constructed (St. John, Direct, p. 8).

In June 1970, SEPA and Applicant entered into a contractual agreement which provides for the scheduling by Applicant and Georgia Power for use in their electric systems: (1) the SEPA capacity and energy allocated to preference customers (except for AEC) in Georgia and Alabama; (2) the outright purchase of 395 megawatts of capacity and associated energy; (3) the firming of the

remaining output of Federal hydroelectric projects; and (4) the delivery of the firm power from SEPA to preference customers connected to Applicant's transmission system (AEC X CRL-79; DJ 3,012; APP. X JHM-A, pp. 42-43; Tr. 21,679). Under this contractual agreement, Applicant receives a large amount of low cost energy for use in its electric system (APP. X 97, DJ 1,001).

J. The Southern Company Pool

Since the mid-1920's, Applicant, Georgia Power, Mississippi Power and Gulf Power, have engaged in common planning, development and operation of their electric utility systems (APP. X JHM-A, p. 93; APP. X JMF-83). Since 1930 a central dispatching center located in Birmingham, Alabama, has coordinated the use of the generating capacity and exchanges of power among Applicant, Georgia, Mississippi, and Gulf Power Company pursuant to contractual agreements (APP. X JHM-A, p. 94).

On October 16, 1950, Applicant, Georgia Power, Gulf Power, Mississippi Power, and Southern Services entered into an interchange contract under which each of the operating companies utilizes the services of Southern Services to assist them in the design, construction and coordination of the operation of their respective electric systems. The contract is known as the Southern Company Power Pool Intercompany Interchange Contract (Interchange Contract), and enables the operating companies to achieve substantial economies and benefits in the utilization of their electric systems. The operation of the interchange among the companies is referred to as the Southern Company Pool. The 1950 Interchange Contract specifies prices for various transactions between the operating companies, including the interchange of power, the pooling of reserves, the provision of transmission services, coordination of scheduled maintenance, seasonal exchanges of power with other electric systems in the southeastern part of the United States, coordination of spinning reserves, and computerized central dispatch of generating resources to make optimum use of generating facilities (APP. X JHM-A, pp. 97-98; Mayben, Direct, pp. 54-55).

The transmission facilities of each of the members of the Southern Company Pool are connected to each of their respective generating facilities, and are interconnected with the transmission facilities of each other by means of high voltage transmission lines so that power generated or received from any member of the pool at any point on the Southern System may be utilized at any other point in the Southern System. The operation of the pool is highly sophisticated (APP. X BMG-1; APP. X BMG-2).

The Interchange Contract is amended on an annual basis, and is filed with the Federal Power Commission. The transactions which take place among members of the Southern Company Pool cannot take place except by means of a contractual agreement filed with the Federal Power Commission. Such transac-

tions are permissible ones among operating subsidiaries of a public utility holding company under the Holding Company Act (15 U.S.C. 79; 16 U.S.C. 8241d; APP. X JMF-A, pp. 491-495; APP. X JMF-73; Tr. 21,298-21,299).

The coordination achieved through operation of the Southern Company Pool enables each of the members to receive substantial cost savings in operating expenses and fixed charges, as well as other benefits such as increased reliability (APP. X JHM-A, p. 99; APP. X JMF-A, pp. 512-514).

V. POWER SUPPLY PRODUCTION AND COORDINATION OF ELECTRIC SYSTEMS

The efficient generation of bulk power and the coordination[8] of its development and integration among electric systems are fundamental to the satisfactory performance and operation of an electric utility.

The methods which electric utilities use to produce their bulk power supply and to coordinate their electric systems are key to an understanding of the activities under the licenses for the Farley Units and the issues in this proceeding. Indeed, the Department and the other parties to this proceeding contend

---

[8] Coordination is an established concept in the electric utility business. Coordinator refers to cooperative action by two or more electric utilities to achieve the economies of overall power supply and electric network integration. Coordination takes place in two categories. First, coordination takes place in the development of electric utility systems. In this regard, it is referred to as coordinated development. Secondly, coordination takes place in operation of electric systems. In this regard, it is referred to as coordinated operations (Mayben, Direct, pp. 8-8, 61-62; Tr. 5,578-5,586).

Coordinated development includes the following: (1) coordinated development of generation by means of staggered construction of units; (2) coordinated development of generation by means of joint ventures; (3) coordinated development of generation by means of jointly owned, separate operating companies; (4) coordinated development of transmission by way of contracts for wheeling services; and (5) coordinated development of transmission by way of joint ownership arrangements (Mayben, Direct pp. 61-62; Tr. 5,580-5,586).

Coordinated operations include the following: (1) reserve sharing; (2) automatic pool assistance under a plan of tie-line biased control; (3) arrangements for handling inadvertent flows; (4) emergency service and maintenance power service under a plan of reserve sharing; (5) economy energy service; (6) seasonal power under a plan of diversity exchange; and (7) hydrothermal coordination (Mayben, Direct, pp. 61-62; Tr. 5,576-5,580).

Coordination among electric utilities is conducted to enhance reliability and to obtain financial (economic) benefits (APP. X JHM-A, (Miller) pp. 97-100; Tr. 1,780-1,783; APP. X WRB-A, (Brownlee) pp. 7-8; FPC *National Power Survey*, Part 1, Chapter 17, "Coordination for Reliability and Economy," December 1971).

Applicant denies that the term "coordination" and its variations are terms of art in the electric utility industry (APP. PPF., Part II, pp. 185-186). We reject Applicant's position on this matter as contrary to the testimony of its own witnesses, as well as the weight of evidence adduced in this proceeding.

that Applicant's ability to produce an economical bulk power supply, while preventing AEC and other electric utilities in central and southern Alabama from doing the same, demonstrates Applicant's monopolization of the wholesale and retail sales of electricity in that area.

The principles of electric power supply production and coordination are generally applicable throughout the electric utility industry (Mayben, Direct, pp. 3-9). These principles do not vary significantly among electric utilities regardless of differences in locations, although they may change to a certain extent depending on corporate policy and financial requirements (Mayben, Direct, pp. 8-9; Tr. 5,576-5,586; FPC *National Power Survey*, Part I, Chapter 17 "Coordination for Reliability and Economy," December 1971).

The methods of producing bulk power and coordination are essential to an electric utility's ability to sell firm power. In the electric utility industry, firm power is defined as a power supply considered to be continuously available to serve a particular load or demand of a particular size at a particular location. Users of electric power desire and expect such power to be continuously available (Mayben, Direct, p. 9). Electric utilities produce electric power by means of generation, which involves the conversion of energy in some other form into electricity. Generation may consist of hydroelectric facilities, fossil-fueled facilities, and nuclear facilities. Applicant generates electric power by ownership and operation of all of these types of facilities (JHM-A, p. 12).

Generating units are subject to mechanical failures which necessitate their removal from service. Mechanical failure of generators is referred to in the electric utility industry as "forced outage." Generating units are also subject to scheduled maintenance which requires their removal from service. Because of such outages, generating units are not continuously available to generate electric power. Consequently, electric utilities must maintain generating facilities in excess of the amount required for them to provide firm power to meet the needs of their customers. The maintenance of generating facilities by electric utilities in excess of the amount required to meet the needs of their customers is known as "reserves" (Mayben, Direct, pp. 9-10, 14).

Electric utilities have developed standards for the maintenance of reserves. These standards vary among utilities. For small electric systems operating in isolation, the "single largest unit down" standard is commonly applied. This standard requires the small electric system to set aside as reserves an amount of generating capacity equal to the capacity of its largest generating unit. Following this criterion, the small utility can meet its load even in the event its largest unit suffers a "forced outage," or is otherwise removed from service. For example, a small electric system with a load of 10 megawatts could serve this load with two 10 megawatt generating units, one to serve the load, and one to be held in reserve for use in the event of a forced outage of the first unit (Mayben, Direct, pp. 9-10, 14, 18-20).

When a small electric system installs larger generating units, and follows the single largest unit down standard of reserves, the electric system must increase the amount of reserves required. Correspondingly, the electric system's cost of producing its electric power supply increases because it experiences additional fixed charges on the reserve equipment which is not used except during periods of forced outage or scheduled maintenance.

The amount of reserves can be reduced by using several smaller generating units to generate power, but a small electric system which installs only small generating units loses the benefit of economies of scale which are achieved from the installation of larger generating units (Mayben, Direct, pp. 9-10, 14-15, 17-19). For example, a small electric utility system could install eleven 1 megawatt generating units in lieu of two 10 megawatt generating units to serve its load of 10 megawatts. In this instance, the electric system could lose its largest generating unit (1 mw) through forced outage, and still supply its 10 megawatt load (with its remaining installed ten 1 mw units). The electric system, however, would lose the benefits of the economies of scale which would result from the installation of a larger generating unit (Mayben, Direct, pp. 14-15).

The interconnection of two electric utilities by means of high voltage transmission lines allows the use of larger generating units while keeping reserves to a more economical level. Interconnection permits electric systems to avoid using the "single largest unit down" standard. By interconnection, two or more electric utilities can join their electric systems and share their reserve capacity. As a result, each utility can make greater use of the generating units which it has installed and which would have to be held in reserve if each system was operating in isolation. In turn, this permits each electric utility to serve more load with less total capacity than each would have been able to serve operating in isolation. Reserve sharing is a form of coordination (Mayben, Direct, pp. 18-20, 61-62).

A reserve sharing arrangement between two or more electric utilities generally consists of an agreement to maintain minimum amounts of reserve capacity necessary to maintain adequate reliability on their combined electric systems, with an allocation of the reserves among the utilities in the sharing arrangement (Mayben, Direct, pp. 19-28; Tr. 1,780). A reserve sharing arrangement can be best understood by reference to an example. Assume a small electric utility, which has a 10 megawatt load and serves that load with two 10 megawatt units, had an opportunity to interconnect with another small electric system which also had a 10 megawatt load and served that load with 10 megawatt units. These two electric utilities, while operating in isolation, have a total installed capacity of 40 megawatts, and if they followed the single largest unit down standard, would have only 20 megawatts of firm capacity. If the two utilities interconnect their electric systems and agree to share their reserves (10 megawatts), the 40 megawatts of installed capacity could be used to serve firm load requirements of

30 megawatts. Through interconnection, the two electric systems have gained 10 megawatts of firm capacity without additional investment in generating units. Thus the two electric systems, by utilizing installed capacity which would have to be held in reserve if they were operating in isolation, are able to serve more load than they would have been able to serve on an isolated basis. In this way, each utility has gained the benefits of more economical operation (Mayben, Direct, pp. 19-20). Moreover, if each utility shared reserves on an equalized basis, each would only be required to maintain five megawatts of generation in reserve, and would be able to utilize 15 megawatts of their generating capacity to sell firm power (Mayben, Direct, pp. 19-20).

There are alternative ways of sharing reserves by utilities which permit them to maintain adequate reliability of their electric systems and at the same time achieve economic benefits in the form of savings in capital investment. These ways include merging or consolidating two or more electric utilities into a single integrated system, or operating electric systems as subsidiary corporations of a public utility holding company (Mayben, Direct, pp. 19-20, 22, 28-29).

There are also a number of ways to express the reserve obligation of electric systems which interconnect and share reserves. These ways include the expression of reserves in the form of a megawatt obligation (where each utility agrees to maintain a certain amount of megawatt capacity in reserve); as a percentage of load (*e.g.*, the reserve is equal to 20% of the utility's total demand); and as a percentage of the largest unit of each electrical system participating in a sharing arrangement (Mayben, Direct, pp. 21-24).

There are also various other coordinating arrangements which are commonly employed among two or more utilities in the electric utility industry to achieve economies in power supply and electric network integration. These arrangements include maintenance power, which is energy supplied by one utility to another to replace energy which is unavailable to the receiving electric system due to outage of a generating unit for scheduled maintenance; emergency power, which is energy supplied by one utility to another on an if-and-when available basis to replace energy which is not available to the receiving electric system due to a forced outage; economy energy, which is energy supplied by one utility to another generally on a "split the savings" basis; diversity seasonal power exchanges; surplus power sales and purchases; and hydrodump energy (Mayben, Direct, pp. 38-40, 60-62).

Economies in overall power supply and electric network integration are also achieved through coordination by two or more electric utilities in the construction and operation of transmission lines for power exchanges between them; through wheeling over an intervening electric system's transmission line, which involves the transfer of electric power over a transmission line either by direct transmission or displacement; through joint construction or joint ventures in ownership of generating units; through staggered construction of generating

units, which involves the installation of a generating unit larger than the installing utility needs, but which permits the installing utility to sell power generated from the excess capacity to a second utility for a period of time; and through similar forms of joint planning of electric power supply (Mayben, Direct, pp. 34-37, 57-58).

The Department and the other parties to this proceeding focus upon the various types of transactions and arrangements which take place in coordination and in the production of bulk power among electric utilities, and urge that such transactions and arrangements constitute a market which they call the power exchange market. The Department and the other parties contend that Applicant engages in these various types of arrangements and transactions as a part of its production of bulk power while, at the same time, denying AEC and other electric systems in central and southern Alabama access to the same. As a result, the Department and the other parties assert that Applicant monopolizes the wholesale and retail sales of electric power in central and southern Alabama. The Department and the other parties state that Applicant's unconditioned use of the Farley Nuclear Units will aggravate this situation, and extend Applicant's monopoly.

VI. LEGAL STANDARDS

A. Antitrust Review Under Section 105c

This case involves the 1970 amendments in Section 105c of the Atomic Energy Act,[9] which require that the Commission shall make a finding as to "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." The specified antitrust laws referred to are the Sherman Act,[10] Wilson Tariff Act,[11] Clayton Act,[12] and Federal Trade Commission Act.[13] The Board's task is to construe this statute to ascertain the Congressional intent and to apply it to the facts as determined from a voluminous record of over 26,900 pages.

The "situation inconsistent with" terminology first was used in the 1954 Act, and it has never been judicially interpreted in any reported case. Its statutory antecedents appear in prior legislation dealing with the disposal of surplus

[9] 42 U.S.C. 2135c.
[10] 15 U.S.C. 1-7.
[11] 15 U.S.C. 8-11.
[12] 15 U.S.C. 12-27, 44; 18 U.S.C. 402; 29 U.S.C. 52-53.
[13] 15 U.S.C. 41-49.

Federal property.[14] Some consideration of the legislative history of the 1970 antitrust review amendments may assist in their interpretation.

From the outset, Congress has been sensitive to the effect of nuclear energy upon the economic, social and political structure of the nation. The declaration of policy in the Atomic Energy Act of 1946 (McMahon Act) stated that the utilization of atomic energy should be "directed toward. . .strengthening free competition in private enterprise. . . ."[15] The Commission was directed by Section 7(c) to condition or deny licenses where activities under a license "might serve to maintain or to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field."

By 1954, the state of the art had reached a point where competitively priced nuclear generated electric power was on the horizon, and it was therefore decided to increase the role of private industry in this new field.[16] The prior statute was substantially rewritten by the Atomic Energy Act of 1954. The language of Section 7 (c) was eliminated, and the declaration of policy stated that the use of atomic energy should be directed so as to ". . .increase the standard of living, and strengthen free competition in private enterprise." The new Section 105(c) provided that when the Commission proposed to issue a commercial license it should notify the Attorney General, who was to advise "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws." There was no express provision for an antitrust hearing prior to the Commission's acting on a proposed license, nor any requirement that it follow the advice of the Attorney General.

The 1970 amendments with which we are presently concerned deleted the "tend to" create or maintain language of prior Section 105(c), and established the current prelicensing antitrust review. The Commission is directed to determine whether the activities under the license would create or maintain a situation inconsistent with the specified antitrust laws.

One of the major questions explored by the Joint Committee on Atomic Energy during its hearings on the proposed 1970 amendments concerned the issue of access by smaller utilities to ownership of, or to power generated from large nuclear power plants.[17] Generally, those speaking on behalf of large, inves-

[14] In 1948, Section 108 of H.R. 6276 used this "situation inconsistent with" language in drafting a proposed Federal Property Act. It was carried over verbatim the following year in Section 207 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 488), and it was deemed by the House Committee on Government Operations to broaden the prior statutory determination of whether a proposed disposal of government property "would violate" the antitrust laws.

[15] Atomic Energy Act of 1946, P.L. 79-585, 60 Stat. 755, Section 1(a).

[16] S. Rep. No. 1699, reprinted in U.S. Code Cong. Serv. 3457-8 (1954).

[17] Prelicensing Antitrust Review Hearings, 91st Cong., 1st Sess., pt. 2, p. 320 *et seq.* (1970), hereafter "Hearings."

tor-owned utilities opposed any antitrust review, or at least that which would consider or affect the access to nuclear power plants or the pooling arrangements between electric generating companies.[18] If there were to be a review, it was urged that it be limited to actual or prospective violations of the antitrust laws.[19] Some sought to eliminate from the review matters which were the subject of regulation by a state of Federal agency.[20] Others considered the Commission to be an inappropriate forum in which to resolve issues relating to monopolization, exclusive dealing arrangements and possible antitrust implications regarding interconnection and power pooling agreements.[21]

The Department of Justice and others urged that access to a nuclear facility might well be required for the continued operation of a given company or section of the industry, and that exclusion probably would create a decisive competitive advantage and should not be permitted.[22] It was urged that the general policy is to allow monopoly only to the extent necessary, and to preserve competition where feasible. Cases were cited to show that a lawful monopolist controlling a unique resource must grant access on equal and nondiscriminatory terms, and that a monopolist may not use its position to extend its monopoly to related areas of business.[23] The Department further expressed the view that fair access could be afforded by ownership shares, or by contract,[24] and that it would not always be satisfactory for the sale of wholesale power to be made at the average cost of the selling utility.[25] Mr. Roland W. Donnem further observed with reference to fair access to nuclear power that "it may well be necessary in some circumstances to make explicit allowance for the competitive advantage conferred on municipally owned companies by virtue of their tax-exempt status. Failure to make such allowance might confer an unfair competititve advantage on municipally owned companies who are permitted to participate. . . ."[26] The "price squeeze" problem was also considered in regard to the price at which nuclear generated wholesale power should be made available to smaller electric companies.[27] It was further stated that "We do not regard such a licensing proceeding as an appropriate forum for wide ranging

---

[18] Hearings, pt. 2, pp. 323-330, 527-537, 566, 569, 610-623.

[19] Pt. 2, pp. 323-324 (Carl Horn, Jr., of Duke Power Co., on behalf of Edison Electric Institute); pp. 397-398 (Sherman R. Knapp of Northeast Utilities).

[20] Pt. 2, p. 647 (Joseph M. Farley of Alabama Power Co.).

[21] Pt. 2, pp. 528-529 (Donald G. Allen of New England Electric System).

[22] Hearings, pt. 1, pp. 9-11, 118, 128-131, 145-147.

[23] Hearings, pt. 1, pp. 9-10 (Roland W. Donnem of the Antitrust Division, Department of Justice).

[24] *Id.*, p. 10.

[25] *Id.*, pp. 128-130.

[26] *Id.*, p. 10.

[27] *Id.*, pp. 10, 147

scrutiny of general industry affairs essentially unconnected with the plant under review."[28] On a number of occasions during the hearings on amending Section 105c, access to transmission was also discussed in terms of the asserted need of smaller utilities to have low cost power wheeled to them across the lines of larger companies. *Kansas Gas and Electric Co. et al.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 571 (1975).

In considering the access issue, the former AEC held in *Waterford I* that intervention petitions by certain cities who sought access to the nuclear facility and who had alleged that the proposed license conditions would not grant such access, satisfied the requirements for intervention and admission as parties.[29] And in *Waterford II*, the AEC discussed the statutory policy of widespread access to nuclear facilities in these terms:

> As stated in our original Memorandum and Order, the requirement in Section 105 for prelicensing antitrust review reflects a basic Congressional concern over access to power produced by nuclear facilities. The Commision's antitrust responsibilities represent *inter alia* a Congressional recognition that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds. It was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC [now NRC] licensing process, and that access to nuclear facilities be as widespread as possible. The Commission is determined strictly to enforce this Congressional intent, and to work with other responsible agencies, such as the Department of Justice and the Federal Power Commission, to assure that AEC-licensed activities accord with the antitrust laws and the policies underlying those laws.[30]

The Appeal Board has also recognized the responsibility of NRC concerning the access question. In *Wolf Creek*, where the issue arose on the pleadings, it stated:

> By virtue of Section 105c of the Atomic Energy Act, the Commission may be called upon to determine whether its licensing the construction or the operation of any commercial nuclear power facility "would create or maintain a situation inconsistent with the antitrust laws." A license need not be withheld where it is determined that such a situation would be created or maintained, but the Commission may place conditions on the license designed to correct the anticompetitive situation. 42 U.S.C. §2135(c). In its

---

[28] Pt. 2, p. 366 (Walker B. Comegys of the Antitrust Division, Department of Justice); Pt. 1, p. 97 (Joseph F. Hennessey, AEC General Counsel).

[29] *Louisiana Power & Light Co.* (Waterford Steam Generating Station, Unit 3), 6 AEC 48 (1973) (Waterford I).

[30] *Louisiana Power & Light Co.* (Waterford Steam Generating Station, Unit 3), 6 AEC 619, 620 (1973).

Waterford decisions, the Commission explained the reasons underlying its involvement in antitrust matters. "The requirement in Section 105 of the Atomic Energy Act for prelicensing antitrust review reflects a basic Congressional concern over access to power produced by nuclear facilities." [Waterford I citation omitted.] The antitrust responsibilities placed on the Commission are "a Congressional recognition that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds. It was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be as widespread as possible." [Citation omitted.][31]

Another Licensing Board has held that under the circumstances of particular cases involving monopolization and restraints of trade, a denial of access to nuclear generation on reasonable terms and conditions itself constituted anticompetitive conduct cognizable in a Section 105c antitrust review.[32]

The Appeal Board also considered other aspects of the statutory duty of the Commission to make antitrust findings in its *Wolf Creek* decision.[33] In that case, a cooperative was offered an ownership interest in a nuclear facility, but it alleged that the Applicant refused to wheel or transmit supplemental power without unreasonable conditions. The Applicant was the dominant utility which controlled the essential transmission facilities in the area, and allegedly the practical effect of its refusal to wheel would prevent the cooperative from gaining meaningful access to the nuclear plant, and hence from competing.[34] There were two major issues on appeal, first whether an "anticompetitive situation" was alleged, *i.e.*, facts demonstrating that granting a license would either create or maintain a situation inconsistent with the antitrust laws; and second, whether there was a nexus between that conduct and the activities to be licensed.

In construing the phrase "activities under the license," the Appeal Board refused to consider the nuclear plant in isolation so as to foreclose inquiry into whether the Applicant had engaged in anticompetitive conduct which was not traceable immediately and directly to operations of the licensed facility itself. The Appeal Board stated that "to the extent that the Applicant's argument suggests that the Commission's cognizance under Section 105c is limited to

[31] *Kansas Gas and Electric Co. and Kansas City Power and Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 564 (1975).

[32] *The Toledo Edison Company, et al.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), *The Cleveland Electric Illimunating Company, et al.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-77-1, 5 NRC 133, 144, 175-176, 186-187, 223, 232 (January 6, 1977).

[33] Kansas Gas and Electric Co., et al., supra.

[34] The Applicant had not refused all wheeling; it was the limitations on its obligation to wheel supplemental power which were at issue.

anticompetitive consequences directly attributable to Applicant's use of the nuclear plant and its output, it makes no sense. As the Staff points out, for activities under a license to 'maintain' a preexisting situation inconsistent with the antitrust laws, some conduct of the Applicant apart from its license activities must have been the 'cause' for bringing about those anticompetitive conditions."[35]

It was observed that the phrase "activities under the license" is defined neither in Section 105 nor elsewhere in the Atomic Energy Act. The only direct discussion in the Joint Committee Report appears at page 31, following a discussion of the antitrust "standard" of judging anticompetitive conduct as being based on "reasonable probability" in contradistinction to absolute "certainty" on one hand or "mere possibility" on the other. The Appeal Board continued,

> In our judgment, two conclusions may properly be drawn from the statutory phrase as illuminated by the Committee's discussion. First, the Joint Committee expected the Commission to concentrate its antitrust scrutiny on the activities of license applicants before it and not to concern itself with anticompetitive conduct in other branches of the electric power industry (*e.g.*, vendors, manufacturers, etc.) except where the applicant was implicated in that conduct. Second, as the Commission's antitrust repsonsibilities are linked to license applications, the Commission's antitrust mandate extends only to anticompetitive situations intertwined with or exacerbated by the award of a license to construct or operate a nuclear facility.[36]

The Appeal Board further considered the implications of review of situations allegedly inconsistent with the antitrust laws, as follows:

> Accordingly, we conclude that the legislative history of Section 105c does not support the applicant's argument that the Commission must consider the operations of each nuclear plant in isolation when making its prelicensing antitrust review. On the contrary, the Commission's statutory obligation is to weigh the anticompetitive *situation* – which to us means that operations in an "air tight chamber" were not intended. A review conducted under the artifical restraints suggested by the applicant would allow long understood and well recognized patterns of anticompetitive conduct to evade Commission notice. It is far too late in the day to dispute that it runs counter to basic antitrust precepts to exercise monopoly power – however lawfully acquired initially – to foreclose competition or to gain competitive advantage, or to use dominance over a facility controlling market access to exclude competition and preserve a monopoly position. Electric utility companies are no more free than others to engage in those practices; their

[35] Wolf Creek, *supra*, p. 568.
[36] *Id.*, p. 569.

> unjustified refusals to wheel power to or to interconnect with smaller entities in the field have regularly been called to account as violative of antitrust policies. It was a key purpose of the prelicense review to ". . .nip in the bud any incipient antitrust situation." [Citations omitted.][37]

With reference to the nexus contention, the Appeal Board observed that the Commission has required a petitioner to plead a meaningful nexus between the activities under a nuclear license and the situation alleged to be inconsistent with the antitrust laws. This is necessary because if the activities relating to a facility have no substantial connection with alleged anticompetitive practices, there is no need for a hearing.[38] The Appeal Board did not find any absence of nexus in that case, and held that the petition was reasonably clear about how the "situation" complained of related to the licensing of the nuclear facility.[39] It was further stated:

> The Commission has never considered itself limited under Section 105c to evaluating the anticompetitive aspects of any nuclear facility *in vacuo*. On the contrary, the Commission has reiterated that far more is required of it by that provision. In *Waterford I, supra*, although commenting that investigation of every aspect of an applicant's electric generation, transmission and distribution activities would not always be required, the Commission explicitly stated that "activities under the license, in most instances, would *not* be limited to construction and operation of the facility to be licensed." 6 AEC at 49 (emphasis added). Again, in *Waterford II, supra*, the Commission stated that, though the precise scope of antitrust review may vary from case to case in other respects, nevertheless "[t]he relationship of the specific nuclear facility to the applicant's total system or power pool should be evaluated in every case." 6 AEC at 621.[40]

The courts have also discussed the issue of a required nexus or connection between activities licensed by various regulatory agencies and anticompetitive conduct by the licensee. For example, *Gulf States Utilities Co.* v. *FPC*[41] involved the question whether the FPC, in passing upon the application of a public utility for authority to issue bonds, must consider the issue's anticompetitive effect in determining whether it is "compatible with the public interest." Several

---

[37] *Id.*, p. 572. *See also Toledo Edison Co., et al.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), *Cleveland Electric Illuminating Company et al.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-385, 5 NRC 621, 631-634 (March 23, 1977).

[38] *Id.*, p. 566.

[39] *Id.*, p. 575.

[40] *Id.*, p. 573.

[41] 411 U.S. 747 (1973).

municipals and cooperatives opposed the issue on the grounds that the utility had engaged in activities violative of the antitrust laws and that these activities in effect would be financed or refinanced by the bonds. The FPC held that such alleged violations were irrelevant to an application that only sought to issue long-term bonds to refund existing short-term notes. The Supreme Court held that under the "public interest" standard of the statute, there was a requirement "that the Commission consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws. . . . Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings."[42] The Court felt that the summary decision of the FPC on the nexus issue provided an inadequate explanation of its reasons for disposing of the antitrust objections on their mertis, if that was what had occurred, and accordingly remanded the case.[43]

The *Gulf States* decision, *supra*, was based in part on the Supreme Court's prior holding in *Denver & R. G. W. R. Co.* v. *United States*[44] that the Interstate Commerce Commission was required under the "public interest" provisions of its statute to consider the anticompetitive consequences of its approval of a sale to Greyhound Corporation by the Railway Express Agency of 20% of the latter's stock. Competitors such as freight forwarders and other bus companies successfully urged that such a 20% stock acquisition would likely result in cooperation between the two companies, which consequently would seriously harm both competition and the public interest.

In a case involving SEC approval of stock acquisitions by electric utility companies in two nuclear powered electric generating companies, it was held that there was a sufficient nexus between allegations of the monopolizing of electric generation in New England through the systematic exclusion from nuc-

---

[42] *Id.*, p. 759. The anticompetitive conduct allegedly consisted of repetitive litigation and a lobbying and public relations drive against a cooperative which delayed an REA loan for five years, by which time the loan was sufficient only for some generation construction, but not for transmission lines.

[43] In his dissenting opinion, Justice Powell argued that the FPC had already properly found that the claims lacked a "reasonable nexus" with the purpose of the securities issuance and should be sustained. In his view, the majority apparently considered that the claim of anticompetitive conduct was at least colorably relevant to the proposed refinancing. 411 U.S. at 767, 776.

[44] 387 U.S. 485 (1967). *See also Toledo Edison Co., et al.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), *Cleveland Electric Illuminating Co., et al.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-385, 5NRC 621, 631-634 (March 23, 1977).

lear power of small electric distributors, and the public interest requirements of the Public Utility Holding Company Act of 1935.[45]

B. Federal Trade Commission Act, Section 5

As the Joint Committee stated in establishing the scope of the Commission's prelicensing review, it did not deem it advisable to go beyond the boundaries of the specified antitrust laws and the policies clearly underlying those laws. The broadest of the relevant statutes it specified in Section 105a is the Federal Trade Commission Act, which, as it observed, embodies provisions that "normally are not identified as antitrust law."[46] Section 5 of that Act states that "Unfair methods of competition in commerce. . .are hereby declared unlawful."[47]

> The Supreme Court has described the scope of Section 5 as follows:
> The "unfair methods of competition" which are condemned by §5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. . . . Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. . . . It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act. . .to stop in their incipiency acts and practices which, when full-blown, would violate those Acts, as well as to condemn as "unfair methods of competition" existing violations of them. [Citations omitted.][48]

Accordingly, exclusive contracts for the display of advertising films produced by four companies which involved three-fourths of the theaters using such films were held to have a tendency to restrain competition and to develop a monopoly. Section 5 was applicable even though there was no concerted activity, and only the unilateral action of each company was challenged. Interestingly, the FTC remedy, which was sustained, limited such exclusive contracts to one year; the Court refused to say that they "should have been banned in their entirety or not at all."[49]

The broad sweep of the Federal Trade Commission Act in relation to the Sherman and Clayton Acts is well exemplified by the Supreme Court's opinion in the *Sperry and Hutchinson* decision.[50] The S & H green stamp company

---

[45] *Municipal Electric Association of Mass.* v. *S.E.C.*, 413 F.2d 1052 (CA DC, 1969). *See also Municipal Electric Association of Mass.* v. *F.P.C.*, 414 F.2d 1206 (CA DC, 1969).

[46] H.R. Rep. No. 91-1470, reprinted in U.S. Code Cong. Serv. 4995 (1970).

[47] 15 U.S.C. Section 45(a) (1).

[48] *F.T.C.* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394 (1953).

[49] *Id.*, p. 396.

[50] *F.T.C.* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972).

which had about 50% of the trading stamp business was held by the FTC to have violated Section 5 by attempting to suppress the operation of trading stamp exchanges and other free and open redemption of stamps. S & H appealed that portion of a cease-and-desist order dealing with its practice of successfully prosecuting or threatening to sue stamp exchanges which redeemed various trading stamps. S & H contended the FTC could restrain only such practices as are either in violation of the antitrust laws, deceptive, or repugnant to public morals. The Fifth Circuit Court of Appeals agreed, holding that to be the type of practice that could be declared "unfair," the conduct must be (1) a *per se* violation of antitrust policy, (2) a violation of the letter of either the Sherman, Clayton, or Robinson-Patman Acts, or (3) a violation of the spirit of those acts as recognized by the Supreme Court. The Supreme Court found this to be an erroneous construction of the reach of Section 5. It held that Congress had explicitly considered, and rejected, the notion that the ambiguity of the phrase "unfair methods of competition" be reduced by tying the concept of unfairness to a common law or statutory standard or by enumerating the particular practices to which it was intended to apply.[51] The Court observed that "Since the sweep and flexibility of this approach were thus made crystal clear, there have twice been judicial attempts to fence in the grounds upon which the FTC might rest a finding of unfairness[52] . . . .neither of these limiting interpretations survives to buttress the Court of Appeal's view of the instant case. . . . But frequent opportunity for reconsideration has consistently and emphatically led this Court to the view that the perspective of Gratz is too confined. As we recently unanimously observed: 'Later cases of this Court . . . have rejected the Gratz view and it is now recognized in line with the dissent of Mr. Justice Brandeis in Gratz that the Commission has broad powers to declare trade practices unfair.' *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 320-321, 16 L. Ed. 2d 587, 591, 86 S. Ct. 1501 (1966)."[53] The Court then concluded by stating the rule as follows:

> Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but Congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[54]

It has long been recognized that although all conduct violative of the

---

[51] *Id.*, p. 240.

[52] *F.T.C.* v. *Gratz*, 253 U.S. 421 (1920); *F.T.C.* v. *Raladam Co.*, 283 U.S. 643 (1931).

[53] Sperry and Hutchinson, *supra*, pp. 241-242.

[54] *Id.*, p. 244.

Sherman or Clayton Acts may likewise come within the unfair trade practice prohibitions of the Federal Trade Commission Act, the converse is not necessarily true.[55] In addition, there are many unfair methods of competition which do not assume the proportions of or fall short of antitrust violations but are covered by Section 5. Thus, a multiple basing point system used by cement manufacturers to bring about uniform prices and terms of sale constituted an unfair method of competition where it either restrained free competition, or was an "incipient menace to it."[56]

One of the major purposes of Section 5 is to stop in their incipiency acts and practices which, when full-blown, would violate the antitrust laws.[57] This ability of the FTC to nip in the bud incipient anticompetitive conduct or practices has been recognized by the courts as one of the fuctions of the Federal Trade Commission Act. This statute was intended to be prophylactic in its effect, and to reach not merely in their fruition but also in their incipiency trade restraints and practices deemed undesirable.[58] The Joint Committee which drafted the 1970 amendments to the Atomic Energy Act also took the view that the licensing process should be used to "nip in the bud any incipient antitrust situation" related to the licensing of nuclear facilities.[59]

In accordance with this delineation of the scope and reach of Section 5, the courts have consistently held that the FTC has the power to arrest trade restraints without proof that they amount to an outright violation of the Sherman or Clayton Acts. Thus, in *Brown Shoe,* a manufacturer's restrictive franchise contracts with retail shoe stores were held to constitute unfair competition under Section 5, without proof that their effect "may be to substantially lessen competition or tend to create a monopoly," which would have to be proved under Section 3 of the Clayton Act.[60] Similarly, in *Atlantic Refining Co.*, a sales commission plan was held to be illegal where a large gasoline distributor agreed with a rubber company to sponsor the sale of the tires, batteries and accessory products (TBA) of the latter to its filling station dealers. The Court expressly found that the contract was not a tying arrangement because the gasoline company was not required to tie its sales of petroleum products to purchases of TBA, nor did it expressly require such purchases of its dealers. Nevertheless, there was a violation of Section 5 because the "central competitive

---

[55] *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 694 (1948).

[56] *Id.*, pp. 694, 708-709.

[57] *F.T.C.* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394-395 (1953).

[58] *Fashion Originators' Guild of America* v. *F.T.C.*, 312 U.S. 457, 466 (1941); *Atlantic Refining Co.* v. *F.T.C.*, 381 U.S. 357 (1965); *F.T.C.* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 322 (1966).

[59] H.R. Rep. No. 91-1470, reprinted in U.S. Code Cong. Serv. 4994 (1970).

[60] *F.T.C.* v. *Brown Shoe Co., Inc., supra*, p. 321.

characteristic was the same"; the effect of the plan "was as though" there was such an agreement; and it was "similar to that of a tie-in."[61]

In monopolization situations, it is not determinative that a complete monopoly has not been achieved, but it is sufficient if it "tends to that end and to deprive the public of the advantages which flow from free competition."[62] A violation of Section 5 may be found where the basic policies of the Sherman or Clayton Acts are infringed, and an actual violation of the underlying statutes need not be found because "whatever the semantic difference between monopolization and tendency to create a monopoly, it is clear that the 'basic policies' of these two prohibitions are the same."[63] It has also been stated that ". . . the Commission [FTC] under Section 5 is not bound to follow antitrust standards as strictly as the courts must in cases under the Sherman and Clayton Acts."[64]

C. Clayton Act, Sections 3 and 7

In evaluating whether the activities under a nuclear plant license would maintain a situation inconsistent with the antitrust laws or their clearly underlying policies, the Clayton Act[65] must also be considered. The Joint Committee Report indicates that Congress had certain language of that act in mind when Section 105c was drafted, stating:

> The committee is well aware of the phrases "may be" and "tend to" in the Clayton Act, and of the meaning they have been given by virtue of the decisions of the Supreme Court and the will of Congress – namely, reasonable probability. The committee has – very deliberately – also chosen the touchstone of reasonable probability for the standard to be considered by the Commission under the revised subsection 105c of the bill.[66]

Section 7 of the Clayton Act prohibits certain corporate mergers where ". . .the effect of such acquisition *may be* substantially to lessen competition . . or to *tend to* create a monopoly. . . ." (Emphasis supplied.)[67] The Supreme Court made an extensive analysis of the history and purpose of this statute as amended in *Brown Shoe Co.* v. *United States*, finding that the intent was to cope with monopolistic tendencies in their incipiency and "to brake this force at its outset" well before it attained such effects as would justify a Sherman Act

---

[61] *Atlantic Refining Co.* v. *FTC*. 381 U.S. 357, 369-371 (1965).

[62] *Fashion Originators' Guild of America* v. *F.T.C.*, 312 U.S. 457, 466 (1941).

[63] *Golden Grain Macaroni Company* v. *F.T.C.*, 472 F.2d 882, 886 (CA 9, 1972).

[64] *L. G. Balfour Company* v. *F.T.C.*, 442 F. 2d 1, 11 (CA 7, 1971). *See also LaPeyre* v. *F.T.C.*, 366 F.2d 117 (CA 5, 1966).

[65] 15 U.S.C. 12-27, 44; 18 U.S.C. 402; 29 U.S.C. 52-53.

[66] S. Rep. No. 91-1247, 91st Cong., 2nd Sess., at 15 (1970).

[67] 15 U.S.C. 18.

proceeding.[68] The dominant theme pervading Congressional consideration of the 1950 amendments was the rising tide of economic concentration, as well as ". . .the desirability of retaining 'local control' over industry and the protection of small businesses."[69] Congressional concern was with the protection of competition, not competitiors, and hence conduct had to be viewed functionally in the context of the particular industry. Of significance would be such aspects as easy access to markets or the foreclosure of business, and the ready entry of new competition or the erection of barriers to prospective entrants.[70] The Court further held that the use of the "may be" language was to indicate that Congressional "concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act."[71] It was observed that the tests for measuring the legality of any particular arrangement under the Clayton Act "are to be less stringent than those used in applying the Sherman Act."[72] One of the clearly underlying policies of this statute was thus described:

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[73]

This "may be" language was similarly construed in *United States* v. *Philadelphia National Bank*,[74] in which a merger of two banks was held to violate Section 7 of the Clayton Act. A prediction of a merger's impact upon competitive conditions in the future was required because a "fundamental purpose of amending Section 7 was to arrest the trend toward concentration, the *tendency* to monopoly, before the customer's alternatives disappeared. . . ."[75] The Court rejected the contention that the increased lending limit of the resulting bank would enable it to compete with large out-of-state banks, holding that anticompetitive effects in one market could not be justified by procompetitive consequences in another. The underlying policy was described as follows:

---

[68] 370 U.S. 294, 318, 346 (1962).
[69] *Id.*, pp. 315-316.
[70] *Id.*, pp. 320-322.
[71] *Id.*, p. 323.
[72] *Id.*, p. 329.
[73] *Id.*, p. 344.
[74] 374 U.S. 321 (1963).
[75] *Id.*, p. 367.

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended §7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.[76]

The concept of arresting monopolies in their incipiency under Section 7 has been stated in cases decided under the original Section 7[77] as well as cases arising under the amended statute.[78]

Section 3 of the Clayton Act is specifically directed at "tying" and other exclusive dealing arrangements, which were believed to impede competition in the distribution process to the extent that Congress decided to proscribe both practices whenever they were reasonably likely substantially to lessen competition, even though actual anticompetitive effects had not yet been shown.[79] This section prohibits such arrangements where their effect *"may be* to substantially lessen competition or *tend to* create a monopoly in any line of commerce." (Emphasis supplied.)[80] This section also has been held to reach agreements in their incipiency, and to be based upon reasonable probability.[81]

D. Sherman Act Monopolization

Section 2 of the Sherman Act provides that "Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. . ." shall be deemed guilty of a felony. This basic statute has been regarded as a charter of freedom, possessing a generality and adaptability comparable to constitutional provision.[82] It has also been described as being as

---

[76] *Id.*, p. 371.

[77] *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 589, 597 (1957).

[78] *F.T.C.* v. *Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964).

[79] *Antitrust Law Development*, American Bar Association (1975), p. 37.

[80] 15 U.S.C. Section 14.

[81] *Standard Fashion Company* v. *Magrane-Houston Company*, 258 U.S. 346 (1922); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 329 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365 (1963); *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 364-365 (1961).

[82] *Appalachian Coals, Inc. V. United States*, 288 U.S. 344,359 (1933); *United States v. E.I. duPont de Nemours and Co.*, 351 U.S. 377, 386 (1956).

important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of fundamental personal freedom.[83] A classic description of the purpose of this act is contained in *Northern Pacific Railway Company* v. *United States,* wherein it is stated:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices,the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[84]

This fundamental national policy regarding the preservation of competition is applicable to the regulated electric utility industry,[85] as well as to other regulated industries under public interest standards.[86] These goals are rendered explicit in the declaration of policy of the Atomic Energy Act of 1954, wherein Section 1 (42 U.S.C. Section 2011) provides in pertinent part that "the development, use and control of atomic energy shall be directed so as too. . .strengthen free competition in private enterprise."

Monopolization has traditionally been defined as consisting of the possession of monopoly power in the economic sense, plus the element of deliberateness or a general intent or purpose to acquire, use or maintain such power.[87] Economic monopoly becomes illegal monopolization not only if it was achieved or preserved by conduct constituting unreasonable restraints of trade, but also if it was deliberately obtained or maintained. The Courts have long defined monopoly as the power to control market prices or exclude competition.[88] In *United States* v. *Grinnell Corp.*, the Supreme Court thus defined it:

> The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from

---

[83] *United States* v. *Topco Associates*, 405 U.S. 596, 610 (1972).

[84] 356 U.S. 1, 4 (1958).

[85] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Col. L. Rev. 64 (1972).

[86] *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747, 759 (1973); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966); *California* v. *F.P.C.*, 369 U.S. 482 (1962); Phillips (ed.), *Promoting Competition In Regulated Markets* (Brookings Institution, 1975).

[87] 1955 Attorney General Rep. 43

[88] *Standard Oil of New Jersey* v. *United States*, 221 U.S. 1 (1911); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946).

growth or development as a consequence of a superior product, business acumen, or historic accident.[89]

Under this requirement, there need be no showing that prices have been raised or competitors actually excluded. Thus in *American Tobacco, supra,* the Supreme Court held "tha. the material consideration in determining whether a monopoly exists is not that prices are raised and that competition acutally is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so." This concept of monopoly was explained in *ALCOA,* where Judge Learned Hand pointed out that all contracts fixing prices are unconditionally prohibited. There is little real difference between such contracts and monopolies, which necessarily involve an equal or even greater power to fix prices. Therefore, "it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control that monopoly confers; they are really partial monopolies."[90]

Monopoly power or market dominance must be viewed functionally in terms of the structure of the particular industry involved. Measuring monopoly power depends upon a careful evaluation of the market and its functioning, to determine on balance whether the control over the interrelated elements of supply, price and entry are sufficiently great to be classed as monopoly power. With regard to market structure, the factors usually considered by the courts include the relative size and strength of competitors, freedom or ease of entry into the market, and the characteristics of consumer demand.[91] The degree of market dominance is generally a starting point for such analysis, although a mechanical application of percentages of the market would not alone be controlling, because the "relative effect of percentage command of a market varies with the setting in which that factor is placed."[92] It was said in *United States Steel* that mere size is not outlawed by Section 2 of the Sherman Act.[93] However, in *Griffith,* the Court, after acknowledging this statement, went on to assert "But size is of course an earmark of monopoly power. Moreover, as stated by Justice Cardozo, speaking for the Court in *United States* v. *Swift & Co.,* 286 U.S. 106, 116, 'size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.' "[94]

---

[89] 384 U.S. 563, 570-71 (1966). See also *United States* v. *E. I. duPont de Nemours & Co.,* 351 U.S. 377 (1956).

[90] *United States* v. *Aluminum Company of America,* 148 F.2d 416, 428 (CA 2, 1945).

[91] 1955 Attorney General Rep. 50, 54.

[92] *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 527 (1948).

[93] *United States* v. *United States Steel Corp.,* 251 U.S. 417, 451 (1920).

[94] *United States* v. *Griffith,* 334 U.S. 100, 107, n. 10 (1948).

Under the circumstances found to exist in particular cases, it has been held that the requisite monopoly power could be based on findings of control of 90% or more of the relevant market.[95] In *ALCOA*, Judge Hand remarked that 90% of supply "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."[96] The Court found that monopoly power existed where the defendant controlled about 81% of all championship boxing matches,[97] and 87% of the accredited central station alarm business. In the latter case, the Court said:

> The existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market. . . . In the present case, 87% of the accredited central station service business leaves no doubt that the congeries of these defendants have monopoly power – power which, as our discussion of the record indicates, they did not hesitate to wield.[98]

Market shares of 65 percent[99] and 70 percent have also been held to constitute monopoly power.[100]

The existence of monopoly power ("monopoly in the concrete")[101] does not by itself prove the offense of monopolization. That offense encompasses the power to raise prices or exclude competition, coupled with "the purpose or intent to exercise that power."[102] The requisite intent is not a specific intent to monopolize, but rather a conclusion based on how the monopoly power was acquired, maintained or used.[103] The element of deliberateness or a general intent to monopolize is sufficient if the monopoly was a probable result of what was done,[104] "for no monopolist monopolizes unconscious of what he was doing."[105]

These principles are summarized in *Griffith* as follows:

It is, however, not always necessary to find a specific intent to restrain trade

---

[95] *Standard Oil Co.* v. *United States*, 221 U.S. 1, 61 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911).

[96] *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (CA 2, 1945). Some text writers have viewed this statement as a confusing dictum. See A. D. Neal, *The Antitrust Laws of the U.S.A.*, p. 108, n. 1 (Cambridge Press, 1970).

[97] *International Boxing Club, Inc.* v. *United States*, 358 U.S. 242 (1959).

[98] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966).

[99] *United States* v. *Besser Manufacturing Co.*, 343 U.S. 444 (1952).

[100] *United Banana Co.* v. *United Fruit Co.*, 362 F.2d 849 (CA 2, 1966).

[101] *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 62 (1911).

[102] *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946).

[103] 1955 Attorney General Rep. at 55.

[104] *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948).

[105] *American Tobacco Co.* v. *United States, supra.*, at 814, *quoting from United States* v. *Aluminum Co. of America*, 148 F.2d 416, 432 (CA 2, 1945).

> or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangments. [Citations] To require a greater showing would cripple the Act. . . . So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under §2 even though it remains unexercised. For §2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control. [Citation] Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power. [Citation] "It is indeed unreasonable, per se, to foreclose competitors from any substantial market." [Citation] The antitrust laws are as much violated by the prevention of competition as by its destruction. . . . It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.[106]

The conduct of a firm possessing monopoly power, however acquired, is generally scrutinized more closely to determine whether it has monopolized (an active verb) than in the case of firms not possessing such economic power. Practices harmless in themselves will not be tolerated when they tend to create or maintain a monopoly.[107] Thus, in *ALCOA*, a producer of aluminum was held to have monopolized the market in virgin ingot by pursuing certain exclusionary practices, which the court described as follows:

> It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret "exclusion" as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.[108]

In *United Shoe*, the acquisition of monopoly control of the shoe machinery market rested in part on the leasing system used by the defendant, which leased but never sold its machines. Judge Wyzanski held that this was "the intermediate case where the causes of an enterprise's success were neither common law re-

---

[106] *United States* v. *Griffith*, 334 U.S. 100, 105, 107 (1948).
[107] *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 428-429 (CA 2, 1945).
[108] *Id.*, at 431.

straints of trade, nor the skill with which the business was conducted, but rather some practice which without being predatory, abusive or coercive was in economic effect exclusionary. . . . Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines."[109]

Another group of cases concerned with monopolistic practices involve the so-called "bottleneck monopolies."[110] In the *Terminal Railroad* case, several railroads set up a joint company which constructed terminal facilities that controlled access to a large city because of its unusual geographical conditions. It was held that although the group's monopoly power was legitimately acquired, it was necessary not to use such power oppressively toward competitors. The Court required the company to be reorganized so as to permit nonproprietary companies to make equal use of the facilities on reasonable and nondiscriminatory terms and conditions.[111] In a similar case, practically all the local trade in fruit and vegetables was centered in a market building which was leased by a company mostly owned by local wholesalers. One of the latter who got in financial difficulties was denied use of the building after amalgamating with an outside dealer. In condemning this conduct, the Court said:

> But it is only at the Building itself that the purchasers to whom a competing wholesaler must sell and the rail facilities which constitute the most economical method of bulk transport are brought together. To impose upon plaintiff the additional expenses of developing another site, attracting buyers, and transhipping his fruit and produce by truck is clearly to extract a monopolist's advantage. . . . The Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones.[112]

In *Associated Press*, a large newsgathering agency established a system of bylaws which prohibited members from selling news to nonmembers, and empowered members to block their competitors from membership. The Court held that this arrangement gave many members a competitive advantage over their rivals, and that such a system designed to stifle competition could not be immunized by adopting a membership device to accomplish that purpose. Such a pooling of economic resources and the power it produced to control the dissemination of news violated the Sherman Act.[113] *Lorain Journal* involved a situation where the only local newspaper made it a condition of accepting

---

[109] *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 344 (D. Mass., 1953), *aff'd. per curiam* 347 U.S. 521 (1954).

[110] A. D. Neale, *supra*, at 67-70, 127-133.

[111] *United States* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912).

[112] *Gamco, Inc.* v. *Providence Fruit & Produce Building, Inc.*, 194 F.2d 484, 487 (CA 1, 1952).

[113] *Associated Press* v. *United States*, 326 U.S. 1, 16-17 (1945).

advertising that the customer should not advertise over the local radio station. The Court found that the newspaper publisher was illegally seeking to maintain its local advertising monopoly, and, in effect, it was trying to force the advertisers to boycott the radio station, which in itself was an attempt to exclude a competitior.[114] Other cases have also held that a refusal by a dominant firm to trade with a small firm, whether as supplier or buyer, may be regarded in effect as a "one-man boycott" and hence as a misuse of market power[115]

Monopolization principles have also been held applicable to an electric utility under Section 2 of the Sherman Act. In *Otter Tail*, a large investor-owned utility was found to have monopolized the retail distribution of electric power in its service area in violation of Section 2 of the Sherman Act. The company prevented communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means employed were refusals to sell power at wholesale to such municipalities, and refusals to "wheel" or transmit power to such systems from other bulk power suppliers which were willing to sell wholesale power but lacked transmission facilities. Each town was held to be a natural monopoly market for the retail distribution and sale of electric power. The Court stated:

> The record makes abundantly clear that Otter Tail used its monopoly power in the cities in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws. See *United States* v. *Griffith*, 334 U.S. 100, 107, 92 L.Ed. 1236, 68 S. Ct. 941. The District Court determined that Otter Tail has "a strategic dominance in the transmission of power in most of its service area" and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply. 331 F. Supp. at 60. Use of monopoly power "to destroy threatened competition" is a violation of the "atempt to monopolize" clause of §2 of the Sherman Act. . . . So are agreements not to compete, with the aim of preserving or extending a monopoly.[116]

Under some circumstances, a "price squeeze" may constitute anticompetitive conduct under the Sherman Act. A "price squeeze" is the term ascribed to a tactic employed by a vertically integrated firm which competes with its nonintegrated customers.This tactic involves the vertically integrated firm either unduly raising the price of its product to its nonintegrated customers (thus

---

[114] *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 152 (1951).

[115] *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *United States* v. *Klearflax Linen Looms*, 63 F. Supp. 32 (DC Minn. 1945).

[116] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377 (1973).

increasing their costs), or unduly lowering the price it charges in its own outlets which compete with its nonintegrated customers, or both. For example, in *ALCOA* the dominant producer of ingot aluminum could not hold the price of ingot so high, and set the price of fabricated sheet aluminum so low, as to drive out of business the sheet rollers who bought ingot from it.[117] In *Conway*, it was held that the FPC had jurisdiction to consider price squeeze allegations made by wholesale customers in a rate case, where a utility selling electricity at both wholesale and retail sought to raise its wholesale rates. The FPC could examine and evaluate the retail rates, over which it did not have jurisdiction, in determining whether the wholesale rates would have anticompetitive effects. The Court stated:

> This argument assumes, however, that ratemaking is an exact science and that there is only one level at which a wholesale rate can be said to be just and reasonable and that any attempt to remedy a discrimination by lowering the jurisdictional rate would always result in an unjustly low rate that would fail to recover fully allocated wholesale costs. As the Court of Appeals pointed out and as this Court has held, however, there is no single cost recovering rate, but a zone of reasonableness. . . . We think the Court of Appeals was quite correct in concluding that "when costs are fully allocated, both the retail rate and the proposed wholesale rate may fall with a zone of reasonableness, yet create a price squeeze between themselves. There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers."[118]

E. Relevant Markets

Although the word "market" does not appear in the antitrust laws, nevertheless it has become a basic concept used in determining whether a firm possesses the power to control prices or exclude competition. Without a definition of the relevant market there is no way to measure a firm's "ability to lessen or destroy competition."[119] In determining the relevant market in which monopoly power is to be measured, the Supreme Court has equated the phrase "any part of trade or commerce"contained in Section 2 of the Sherman Act with that of "any line of commerce in any section of the country" contained in Section 7

---

[117] *United States* v. *Aluminum Company of America*, 148 F.2d 416, 436-438 (CA 2, 1945).

[118] *F.P.C.* v. *Conway Corporation* ____U.S. ____,48 L.Ed. 2d 626, 633-634 (1976).

[119] *Walker Process Equip., Inc.* v. *Food Mach. and Chem. Corp.*, 382 U.S. 172, 177 (1965).

of the Clayton Act. Accordingly, market definitions applied in merger cases may be applicable to monopolization analysis.[120]

The appropriate market has been defined as the "area of effective competition"[121] within which the parties operate, and the definition "turns on discovering patterns of trade which are followed in practice."[122] The market selected must also "correspond to the commercial realities" of the industry and be economically significant.[123] For analytical purposes the Courts have traditionally examined both the product and the geographic dimensions of the market. Thus in *Brown Shoe* it was held that "the 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')."[124] And the Court has pointed out that the Sherman Act has "both a geographical and distributive significance and [applies] to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce."[125]

Determination of the product market depends on how different from one another the offered commodities are in character or use, and how far buyers will go to substitute one commodity for another. In *Times-Picayune* the Court observed that "for every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small."[126]

In the *Cellophane* case, the Court was required to determine whether the relevant product market was cellophane (of which duPont had a 75 percent share) or all flexible packaging material, of which duPont's share was less than 20 percent. The Court stated:

> When a product is controlled by one interest, without subsitutes available in the market, there is monopoly power. Because most products have possible substitutes, we cannot . . . give "that infinite range" to the definition of substitutes. . . . Nor is it a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market.[127]

---

[120] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572-573 (1966).

[121] *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299 (1949).

[122] *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 303 (D. Mass., 1953), *aff'd. per curiam*, 347 U.S. 521 (1954).

[123] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336 (1962).

[124] *Id.*, at 324.

[125] *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 279 (1934).

[126] *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 612 (1953).

[127] *United States* v. *E. I. duPont de Nemours and Co.*, 351 U.S. 377, 394 (1956).

Although cellophane differed from other flexible packaging materials, it also had to meet competition from other materials in every one of its described uses. Finding that "a very considerable degree of functional interchangeability exists between these products,"[128] the Court held that the product market was that of flexible packaging materials on a national basis. As DuPont had less than 20 percent of this market, monopoly power was found to be lacking. In summary, it was stated:

> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.[129]

Narrower markets or submarkets have also resulted from the use of the reasonably interchangeable test. *Paramount Pictures* held that first run showings of motion pictures, rather than all movie exhibitions, constituted a distinct market.[130] And in *International Boxing Club*, out of the entire field of professional boxing, the Court carved a market in championship contests alone, holding that "Similarly, championship boxing is the 'cream' of the boxing business, and, as has been shown above [greater ticket revenue, valuable TV rights, higher Nielsen ratings and saleable movie rights], is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes."[131]

In *Grinnell*, the Court found no barrier to combining in a single market a number of different products or services where that combination reflected commercial realities. Accordingly a single basic service—the protection of property through the use of an accredited central station—was compared with all other forms of property protection. Accredited central station protective services formed a distinct product market, the Court held, because other types of burglar, fire and water alarm services did not meet the reasonably interchangeable test of substitutability.[132] The Court relied in part on its previous holding in *Philadelphia National Bank* that " 'the cluster' of services denoted by the term 'commercial banking' is 'a distinct line of commerce.' "[133] *Brown Shoe*, a merger case, found that the relevant lines of commerce were men's, women's and children's shoes, classified separately and independently. The facts

---

[128] *Id.*, at 399.

[129] *Id.*, at 404. See also *Antitrust Law Developments*, American Bar Association (1975), at 49.

[130] *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

[131] *International Boxing Club, Inc.* v. *United States*, 358 U.S. 242, 252 (1959).

[132] 384 U.S. 563, 572-573.

[133] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356 (1963).

to be considered in defining a product market were thus described by the Court:

> The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[134]

The geographic reach of the market also must be determined in any consideration of monopoly power. The relevant geographic market has been defined as the area in which sellers of the particular product or services operate, and to which buyers can practicably turn for such products or services.[135] The applicable principles were described in *Brown Shoe* as follows:

> The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. . . . *United States* v. *E. I. duPont de Nemours and Co.*, 35 U.S. 586, 593, 1 L.Ed. 2d 1057, 1066, 77 S. Ct. 872. Moreover, just as a product submarket may have §7 significance as the proper "line of commerce," so may a geographic submarket be considered the appropriate "section of the country." *Erie Sand and Gravel Co.* v. *Federal Trade Commission*, 291 F.2d 279, 283 (CA 3d Cir.); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 595-603 (DC SD NY). Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area.[136]

In *Pabst Brewing Co.*, the Court indicated that "section of the country" does not require delineation by metes and bounds, and accordingly a single or a three state area could comprise a relevant market.[137] The importance of commercial and economic factors in defining market boundaries was stressed in *Philadelphia National Bank*, where the factor of inconvenience was found to localize banking competition as effectively as high transportation costs in other

---

[134] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325-326 (1962).

[135] *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299 n. 5 (1949); *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961).

[136] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336 (1962), citing *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 193-194 (DC SD NY); *United States* v. *Maryland and Virginia Milk Producers Ass.*, 167 F. Supp. 799 (DC DC, 1959), *aff'd.* 362 U.S. 458 (1960).

[137] *United States* v. *Pabst Brewing Co.* 384 U.S. 546 (1966).

industries. Accordingly, a four-county area was selected as the area of effective competition.[138] Under this same analytical approach, relevant geographic areas have been held to comprise national markets,[139] regional markets,[140] single states,[141] and metropolitan areas.[142]

One court after reviewing the authorities summarized the relevant market considerations as follows:

> It seems clear from the decided cases that (1) while the outer limits of the market may be determined by the competition of interchangeable products, (2) there may be a well defined submarket which constitutes the relevant market for antitrust purposes, which (3) must correspond to the commercial realities of the industry, (4) is affected by price disadvantages due to transportation costs, (5) is affected by availability of a buyer to supply and existence of economic areas which significantly impede competition, (6) is determined in part with relation to the parties affected in the suit, and (7) is a question of fact in the particular case.[143]

F. Regulated Industry Defenses

1. Immunity From Antitrust Coverage

Although Congress has never exempted the electric power industry from the application of the antitrust laws, until recently, antitrust policy was rarely viewed as important in this industry. Regulatory practices almost uniformly reflected the traditional view that the industry was a natural monopoly, ill-adapted to the application of antitrust principles.[144] However, in recent years the courts have held the antitrust laws to be applicable to various regulated industries under the public interest provisions of regulatory statutes.[145] The fundamental national policy embodied in the antitrust laws has been held to

---

[138] *United States* v. *Philadelphia National Bank*, 374, U.S. 321, 358-361 (1963).

[139] *United States* v. *Continental Can Co.*, 378 U.S. 441, 447 (1964).

[140] *United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158, 161 (1964); *United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 146 (ND Cal.), *aff'd mem.*, 385 U.S. 37 (1966).

[141] *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964).

[142] *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966); *United States* v. *Phillipsburg National Bank and Trust Co.*, 399 U.S. 350 (1970).

[143] *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 456 (CA 9, 1966), *rev'd on other grounds*, 389 U.S. 384 (1967).

[144] Meeks, *Concentration In The Electric Power Industry: The Impact Of Antitrust Policy*, 72 Col. L. Rev. 64, 65-67 (1972).

[145] *McLean Trucking Company* v. *United States*, 321 U.S. 67 (1944); *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953); *California* v. *FPC*, 369 U.S. 482 (1962); *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968).

apply to regulated industries unless express immunity is conferred by law, and "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[146]

The Supreme Court made it clear in *Otter Tail* that the Federal antitrust laws are applicable to electric utilities, holding that regulation by the Federal Power Commission was not meant to insulate electric companies from monopolization charges based upon refusals to deal. Congress was deemed to have "rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships." Thus, there was no basis for concluding that the limited authority of the Federal Power Commission to order interconnections "was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations."[147] It is important to note that the refusal to deal in *Otter Tail* related to the wholesale power supply level, wherein the dominant utility was not willing to sell power at wholesale or to wheel power over its transmission lines from another supplier to a municipality, where the latter's retail distribution franchise to the dominant utility had expired and it was desired to replace it with a municipal retail distribution systems. Such towns could accommodate only one distribution sytem, thereby "making each town a natural monopoly market for the distribution and sale of electric power at retail. . . . The antitrust charge against *Otter Tail* does not involve the lawfulness of its retail outlets, but only its methods of preventing the towns it served from establishing their own municipal systems when Otter Tail's franchises expired."[148] Consequently, Otter Tail's consistent refusals to wholesale or wheel power to its municipal customers were held to constitute illegal monopolization. With respect to wheeling, the Court noted that the original draft of the Federal Power Act included a common carrier provision and the power to order wheeling, but these provisions were eliminated and "the common carrier provision in the original bill and the power to direct wheeling were left to the 'voluntary coordination of electric facilities.' Insofar as the District Court ordered wheeling to correct anticompetitive and monopolistic practices of Otter Tail, there is no conflict with the authority of the Federal Power Commission."[149]

The recent *Cantor* case involved a claim by a retail druggist selling light

---

[146] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350 (1963). See also *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-361 (1963).

[147] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973). *See also Toledo Edison Company, et al.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), *Cleveland Electric Illuminating Company, et al.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-385, 5 NRC 621, 631-634 (March 23, 1977).

[148] *Id.*, at 369-370.

[149] *Id.*, at 374, 376.

bulbs that a utility was using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs in violation of the Sherman Act. The utility distributed light bulbs to its customers, who were billed for the electricity they consumed but paid no separate charge for light bulbs. The rates, including the omission of any separate charge for bulbs, had been approved by the Michigan Public Service Commission, and could not be changed without its approval of a new tariff. In reviewing the applicability of the antitrust laws to this situation, the Court stated:

> Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition. Agricultural marketing programs, such as that involved in *Parker,* were of that character. But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy.[150]

As mentioned earlier, in *Conway* it was held that the FPC had jurisdiction to consider "price squeeze" contentions made by wholesale customers in a rate case, where a power company that sold electricity at both wholesale and retail sought to raise its wholesale rates.[151] The FPC could consider the retail rates, over which it did not have jurisdiction, in determining whether the jurisdictional wholesale rates would have anticompetitive effects.

Gulf States also held that the FPC must consider antitrust issues in determining whether a securities issue was in the public interest. In considering the relationship between the Federal Power Act and the antitrust laws, the Court stated:

> The Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry. Indeed, within the confines of a basic natural monopoly structure, limited competition of the sort protected by the antitrust laws seems to have been anticipated. See *Otter Tail Power Co.* v. *United States*.... Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.[152]

---

[150] *Cantor* v. *Detroit Edison Co.*, ___ U.S. ___, 49 L.Ed.2d 1,141, 1,151-1,153(1976).
[151] *F.P.C.* v. *Conway Corporation*, ___ U.S. ___, 48 L.Ed. 2d 626 (1976).
[152] *Gulf States Utilities* v. *F.P.C.*, 411 U.S. 747, 759-760 (1973).

2. Governmental Action

The power to grant exemptions or immunity from the antitrust laws resides exclusively in Congress, and consequently neither Federal nor state officials have any power to grant immunity when Congress has not done so.[153] It is, therefore, no defense to an antitrust action that the challenged conduct was known or even approved by Federal officials, if such action was not taken pursuant to Congressional authorization.[154] For example, the fact that certain restrictive provisions were contained in a contract between an electric utility and the Bureau of Reclamation was deemed immaterial, since "government contracting officers do not have the power to grant immunity from the Sherman Act."[155]

The *Parker* v. *Brown* case involves the inapplicability of the Sherman Act to official state actions where the state purports to act as a sovereign. This decision is regularly invoked in analyzing the relationship between state regulatory action and the Federal antitrust laws. In *Parker,* there was a challenge by a grower under the commerce and supremacy clauses to the constitutionality of the California Agricultural Prorate Act, which authorized the director of agriculture and other state officials to establish a marketing program so as to restrict competition among growers and maintain prices in the distribution of their commodities. The Supreme Court found no conflict between this state statute and the Sherman Act, even though comparable programs organized by private persons would be illegal, stating:

> But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . . True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . and we have no question of the state or its municipality becoming a participant in a private agreement or combination

---

[153] *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-227 (1940).

[154] *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (CA DC, 1971).

[155] *Otter Tail, supra,* 410 U.S. at 378-379.

> by others for restraint of trade . . . . The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.[156]

Eight years later in *Schwegmann*, the Court invalidated a plaintiff's entire resale price maintenance program, because the nonsigner provisions of the Louisiana Fair Trade law were in conflict with the Sherman Act. This Louisiana statute imposed a direct restraint on retailers who had not signed the fair trade agreements. Thus although the private decision to enforce a statewide fair trade program was not only approved by the state, but actually would have been ineffective without the statutory command to nonsigners to adhere to the prices set by the plaintiff, the rationale of *Parker* v. *Brown* did not immunize the restraint. The Court said that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker* v *Brown*, 317 U.S. 341, 350." It was further emphasized that the "fact that a state authorizes the price fixing does not, of course, give immunity to the scheme absent approval by Congress."[157]

The *Parker* doctrine was further clarified in *Continental Ore*, holding that such immunity did not apply to private activities permitted, but not required, by law. In that case, under Canadian law, authority was granted to the Metals Comptroller to allocate and ration metals during the war. This power was delegated to a private firm, which purchased vanadium from two suppliers but excluded a third supplier. The Court held it was no defense that the delegated purchasing agent "was acting in a manner permitted by Canadian law," where there was "nothing to indicate that such law . . . compelled discriminatory purchasing."[158]

In two recent decisions, the Supreme Court has further analyzed and discussed the *Parker* v. *Brown* doctrine. *Goldfarb* involved a minimum fee schedule for lawyers examining real estate titles, which was published by a

---

[156] *Parker* v. *Brown*, 317 U.S. 341, 350-352 (1943).

[157] *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 386, 389 (1951).

[158] *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-707 (1962). Courts of Appeals have searched for ways to reconcile and harmonize the Federal antitrust laws with permissible state action, with results not totally consistent. *See Hecht* v. *Pro-football, Inc.*, 444 F.2d 931, 934 (CA DC, 1971); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (CA 5, 1971); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 424 F.2d 25 (CA 1, 1970); *Asheville Tobacco Bd. of Trade, Inc.* v. *F.T.C.*, 263 F.2d 502 (CA 4, 1959). *Cf. Gas Light Co.* v. *Georgia Power Company*, 440 F.2d 1135 (CA 5, 1971); *Washington Gas Light Co.* v. *Virginia Electric Power Co.*, 438 F.2d 248 (CA 4, 1971); *Allstate Ins. Co.* v. *Lanier*, 361 F.2d 870 (CA 4, 1966).

county bar association and enforced by the state bar. This endeavor was challenged as violative of the Sherman Act. The Court states:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign. *Parker* v. *Brown* . . . although the [Virginia] Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities . . . . Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the state acting as a sovereign.[159]

Cantor involved a fundamental analysis of *Parker* v. *Brown*, stemming from conduct by a pervasively regulated electric utility in furnishing light bulbs without charge to its customers. Its rates, which reflected the omission of any separate charge for bulbs, had been approved by the state commission and could not be changed without the latter's approval. Justice Stephen's plurality opinion made a detailed study of the history and scope of *Parker*, describing it as a narrow holding limited to official action taken by state officers pursuant to express legislative command by the state acting as a sovereign. The *Parker* opinion with carefully chosen language involving 13 separate references, applied only to official action, as opposed to private action approved, supported or even directed by the State. The only parties in that case were state public officials, and there was no claim that any private person or company had violated the antitrust laws. Justice Stephens observed that the Sherman Act "proscribes the conduct of persons, not programs, and the narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program."[160] The light bulb program was considered to be the product of a decision in which both the respondent which initiated it and the state commission which approved it participated. The respondent's participation was held to be "sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable Federal law."[161] The Court further stated:

---

[159] *Goldfarb* v. *Virginia State Bar*, 421 U.S. 733, 790-791 (1975).

[160] *Cantor* v. *Detroit Edison Company*, ___U.S.___, 49 L.Ed. 2d 1141, 1155 (1976).

[161] *Id.*, at 1152.

> For typically cases of this kind involve a blend of private and public decisionmaking. The Court has already decided that state authorization, approval, encouragement or participation in restrictive private conduct confers no antitrust immunity .... [Footnotes and citations omitted] In each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking. In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.[162]

Accordingly, it was held that Michigan's regulation of respondent's distribution of electricity "poses no necessary conflict with a Federal requirement that respondent's activities in competitive markets satisfy antitrust standards," citing *Otter Tail* as establishing that Federal antitrust laws are applicable to electrical utilities in competitive markets.[163]

3. Use of Judicial and Administrative Processes (Noerr-Pennington Doctrine)

An extension of the *Parker* v. *Brown* concept, *supra*, holding in effect that restraints on trade that are the result of valid governmental action are not within the scope of the Sherman Act, has been the development of the so-called *Noerr-Pennington* doctrine. The latter doctrine involves the applicability of the antitrust laws to various efforts undertaken to influence governmental action, whether legislative, executive, judicial or administrative. In situations where it is applicable, the doctrine confers immunity from liability under the antitrust laws for actions, regardless of their anticompetitive intent or purpose, which genuinely seeks to influence the passage or enforcement of laws, or to invoke governmental decision-making processes involving the courts or administrative agencies. Concomitantly, such antitrust immunity is limited by the "sham exception," which applies to conduct ostensibly directed toward influencing governmental action, but which is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.[164]

In *Noerr*[165] a group of railroads allegedly conspired to monopolize trade in the freight business by instituting an intensive publicity campaign to secure the

---

[162] *Id.*, at 1150-1151.

[163] *Id.*, at 1153.

[164] The board made an extensive analysis of the applicable case law on this subject in its Memorandum and Order of November 25, 1975, LBP-75-69, 2 NRC 822.

[165] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

passage and enforcement of legislation unfavorable to the trucking industry. The campaign was described as "vicious, corrupt and fraudulent," with the sole motivation to destroy the truckers as competitors. The Court held that where restraints on trade were "the result of valid governmental action" (citing *Parker v. Brown*), there was no violation of the antitrust laws, and hence no violation could "be predicated upon mere attempts to influence the passage or enforcement of laws." The whole concept of representative government depends on the ability of the people to make their wishes known, and to hold "that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity," which would be contrary to its legislative history (365 U.S. at 137). Equally significant, such a construction would raise constitutional questions, since the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Accordingly, even if the railroads' sole purpose was to destroy their competitors, that fact did not "transform conduct otherwise lawful into a violation of the Sherman Act." However, the court also articulated a "sham exception" to this antitrust immunity, stating:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing government action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. (365 U.S. at 144)

In *Pennington*[166] the *Noerr* principles were extended to other public officials, and the rule was expanded beyond the protection of political activity. The UMW union allegedly conspired with large coal operators to impose high wage and royalty scales which would drive smaller operators out of business. The parties had successfully induced the Secretary of Labor to set high minimum wages under the Walsh-Healey Act for companies selling coal to TVA. The Court held that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competion. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act" (381 U.S. at 670). Accordingly there could be no recovery based on the action of the Secretary of Labor. However, it was also held that although the Walsh-Healey episodes were immunized, nevertheless the existence of this protected activity did not immunize other parts of the scheme. In a widely cited footnote the Court said:

It would of course still be within the province of the trial judge to admit

[166] *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965).

> this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transaction under scrutiny." (381 U.S. at 670)

The admissible nonimmunized transactions referred to were contemporaneous UMW collective bargaining contracts with the large coal companies agreeing to rapid mechanization and other conditions onerous to the small operators. Lower courts have subsequently followed the rule that purpose and character inferences relating to nonexempt transactions may be drawn in part from participation in protected or immunized activities, provided such evidence is deemed probative and not unduly prejudicial to a jury.[167]

Subsequently the Supreme Court in *Trucking Unlimited*[168] held that the "right to petition extends to all departments of the government," including state and Federal administrative agencies and courts. The right of access to the courts was deemed to be "but one aspect of the right of petition." However, the Court also considered extensively the sham exception of *Noerr* as adapted to the adjudicatory process. It was alleged that a number of trucking companies had conspired to monopolize trucking in California and to put their competitors out of business. To that end the defendants agreed jointly to finance, carry out and publicize a systematic program of opposing, with or without probable cause and regardless of the merits of the cases, virtually every application for operating rights before the PUC, the ICC, and the courts. The Court stated:

> The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be "to discourage and ultimately to prevent the respondents from invoking" the processes of the administrative agencies and courts and thus fall within the exception to Noerr . . . Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that

---

[167] *Hayes* v. *United Fireworks*, 420 F.2d 836, 840 (CA 9, 1969); *Household Goods Carrier's Bureau* v. *Terrell*, 417 F.2d 47, 52, *rehearing en banc*, 452 F.2d 152, 158 (CA 5, 1971); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931, 940 (CA DC, 1971); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 29 (CA 1, 1970). *Cf. United States* v. *Johns-Manville Corp.*, 259 F. Supp. 440 (E.D. Pa., 1966); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506, 516 (CA 6, 1972).

[168] *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

> does not necessarily give them immunity from the antitrust laws. It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute . . . First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (citation omitted) which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having "free and unlimited access" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another . . . If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful. (404 U.S. at 512-515)

The Court noted that the political campaign operated by the railroads in *Noerr* employed deception, misrepresentation and unethical tactics, but also observed that Congress has traditionally exercised extreme caution in legislation respecting political activities. However, it further stated that "unethical conduct in the setting of the adjudicatory process often results in sanctions," citing cases dealing with perjury, use of a patent obtained by fraud to exclude a competitor, conspiracy with a licensing authority to eliminate a competitor, and bribery of a public official. The Court then continued:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression." (404 U.S. at 513)

Otter Tail[169] is the most recent application of *Noerr* principles by the Supreme Court. The charges of monopolization by a dominant electric utility

[169] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

were based among other things on its alleged repeated institution and support of baseless litigation designed to prevent or delay the establishment of municipal distribution systems. The district court found that most of the litigation was carried to the highest available appellate court, and although all of it was unsuccessful on the merits, the pendency of litigation prevented the marketing of municipal bonds necessary to establish an electric system. However, the district court held that the *Noerr* doctrine was applicable "only to efforts aimed at influencing the legislative and executive branches of the government" (331 F. Supp. 54, 62). The Supreme Court otherwise affirmed a finding for the government but vacated that phase of the order dealing with sham litigation and remanded for further consideration in the light of its intervening decision in *Trucking Unlimited*, stating:

> That was written before we decided *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513, where we held that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose is to suppress competition evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus within the "mere sham" exception announced in *Noerr.* (410 U.S. at 380)

Upon reconsideration the district court reached the same conclusion as before, finding that:

> The repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly. I find the litigation comes within the sham exception to the Noerr doctrine as defined by the Supreme Court in *California Transport.* [170]

The Supreme Court affirmed per curiam the judgment entered on remand.[171]

There is a long line of authority, both before and after the *Noerr* decision, wherein the Federal courts have held that patent infringement litigation violates the Sherman Act where it is an integral part of a pattern of conduct designed to restrain trade or to monopolize over and beyond the monopoly created by the patent.[172] One such case was cited by Justice Douglas in his opinion in *Trucking Unlimited, supra.*[173]

---

[170] 360 F. Supp. 451 (D. Minn., 1973).

[171] 417 U.S. 901 (1974).

[172] *United States* v. *Singer Manufacturing Co.,* 374 U.S. 174 (1963); *Mach-Tronics, Inc.* v. *Zirpoli,* 316 F.2d 820 (CA 9, 1963); *Kobe, Inc.* v. *Dempsey Pump Co.,* 198 F.2d 416 (CA 10, 1952); *United States* v. *Krasnov,* 143 F. Supp. 184 (E.D. Pa., 1956), *aff'd. per curiam,* 355 U.S. 5 (1957). See also Blecher and Bennett, *Litigation As An Integral Part of a Scheme to Create or Maintain An Illegal Monopoly,* 26 Mercer L. Rev. 479, 491 (1975).

[173] *Walker Process Equipment, Inc.* v. *Ford Machinery and Chemical Corp.,* 382 U.S. 172 (1965).

It has been held that the *Noerr-Pennington* immunity is not applicable to efforts to influence a governmental body acting in a commercial or propriety capacity rather than in a policy-making capacity.[174] And in *Otter Tail* the Court considered evidence relating to contracts and transactions between the utility and the U.S. Bureau of Reclamation, holding that "government contracting officers do not have the power to grant immunity from the Sherman Act" (410 U.S. at 378).

From the foregoing cases it appears that there is no antitrust liability for genuine, as distinguished from sham, attempts to influence valid governmental action by any branch of the government, state or Federal. Within the scope of the constitutional right of petition, the motives which accompany such attempts are irrelevant, regardless of their anticompetitive intent or purpose. Activities in a legislative or other nonadjudicatory setting are not within the antitrust laws even though they may include unethical or reprehensible conduct. However, unethical practices which may corrupt administrative or judicial processes can result in antitrust violations. Joint efforts to influence public officials are not illegal though intended to eliminate competition, either standing alone or as part of a broader scheme itself violative of the Sherman Act. But attempts to influence governmental action, when used as an integral part of conduct which violates the antitrust laws, are not immunized and fall within the sham exception. In the adjudicatory process, the sham exception may involve such matters as misrepresentation, conspiracy with a licensing authority, a pattern of baseless claims amounting to abuse of the judicial process, or repetitive use of insubstantial litigation to suppress competition.

4. Primary Jurisdiction

The judicial doctrine of "primary jurisdiction" is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It is a sometimes loosely defined concept by which the courts attempt to avoid or adjust judicial-administrative conflict over the application of antitrust principles and agency regulatory goals. In one sense it has been used in situations where the administrative agency's jurisdiction has been held to be exclusive, thereby ousting the courts of antitrust jurisdiction except to review the correctness of the agency decision under the standards of the regulatory statute.[175] In another sense primary jurisdiction has referred to

[174] *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (CA 1, 1970); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (1971), *cert. denied*, 404 U.S. 1047; *Breard* v. *City of Alexandria*, 341 U.S. 622, 641 (1951); *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). *Cf. United States* v. *Johns-Manville Corp.*, 245 F. Supp. 74, 81 (E.D. Pa., 1965).

[175] *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963).

initial but not exclusive agency jurisdiction, leading to the staying of court antitrust proceedings until the agency had made its initial determination.[176] But the doctrine has been held inapplicable where there was "no pervasive regulatory scheme, and no rate structures to throw out of balance" by sporadic action by the Federal courts.[177]

In the instant case, the term primary jurisdiction has been urged in still a different sense. The Applicant has contended that the FPC and the SEC have primary jurisdiction of the applicability of the antitrust laws to the competitive conditions under which the Applicant operates. It therefore argues that this Board should either defer to its antitrust scrutiny to those agencies, or be bound by their alleged approval of the practices in question.[178]

The *Otter Tail* decision has already established that there was no pervasive regulatory scheme including the antitrust laws that had been entrusted to the FPC, and that "Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."[179] (The *Radio Corp. of America* holding was specifically referred to by the Court. 410 U.S. at 373.) Thus even under the more rigid judicial doctrine, primary jurisdiction could not be attributed to the FPC, or by the same reasoning to the SEC.

However, the situation presented here does not involve the relationship between the courts and administrative agencies with regard to antitrust scrutiny, but rather the distribution of antitrust functions among three Federal agencies. The NRC has a specific statutory mandate under Section 105c to make an antitrust review and finding for licensing purposes. The consideration of antitrust consequences by the FPC and the SEC under their own regulatory statutes, while important aspects of the public interest, is not the primary function of such agencies.[180]

The legislative history of the 1970 antitrust amendments of Section 105c shows that the Joint Committee on Atomic Energy took into consideration the relationship which would exist among these Federal agencies with respect to antitrust review. The Department of Justice advised that other regulatory agencies such as the FPC and the SEC could defer in appropriate cases to the

---

[176] *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973).

[177] *United States* v. *Radio Corp. of America*, 358 U.S. 334, 349-350 (1959). *See also Toledo Edison Co., et al.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), *Cleveland Electric Illuminating Co., et al.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-385, 5 NRC 621, 631-634 (March 23, 1977).

[178] App. Br. pp. L-121-124, 127-131; Reply Br. pp. 62-68.

[179] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 373-374 (1973).

[180] *Gulf States Utilities* v. *F.P.C.*, 411 U.S. 747 (1973); *Municipal Electric Association of Mass.* v. *F.P.C.*, 414 F.2d 1206 (CA DC, 1969); *Municipal Electric Association of Mass.* v. *S.E.C.*, 413 F.2d 1052 (CA DC, 1969).

nuclear license conditions, "made upon an adequate record and after due consideration, in the interest of expedition and certainty." The Department further responded to written questions by the Joint Committee as follows:

> In view of this, we would generally expect the Atomic Energy Commission to be the primary forum for the Attorney General's presentation of issues common to all the agencies which must grant regulatory approval. Similarly, we think it likely that in most cases the other regulatory agencies would think it appropriate for the Atomic Energy Commission to proceed first with its hearing of the antitrust issues and would give the Commission's adjudication of these issues heavy weight.[181]

Section 271 relating to agency jurisdiction[182] and Section 272 concerning the applicability of the Federal Power Act, [183] cannot be construed as limiting the antitrust licensing review jurisdiction of NRC. The proviso added to Section 271 in 1965 shows on its face that no other agency was to have "any authority to regulate, control, or restrict any activities" of NRC. This proviso would control subsequently granted antitrust review and license conditioning functions of the Commission. Section 272 was intended to preserve the existing regulatory powers of the FPC over electric utilities which supplied wholesale power in interstate commerce, not to supplant the antitrust licensing responsibilities specifically imposed upon NRC when Section 105c was substantially expanded by the 1970 amendments. The section-by-section analysis in the Joint Committee Report states:

> During the hearings pertaining to this legislation there was a suggestion that there ought to be a clearer indication of Congressional intent that Section 272 of the Atomic Energy Act did not constitute a modification of the Federal Power Act. The Joint Committee very carefully considered this term and concluded that the legislative history of Section 272 indicated quite clearly that the committee and the Congress had not intended thereby to modify or affect in any way the provisions of the Federal Power Act. The committee unanimously reconfirms this intention. In effect Section 272

[181] Hearings, Pt. 1, p. 145.

[182] "Sec. 271. Agency Jurisdiction. – Nothing in this Act shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission: *Provided*, That this section shall not be deemed to confer upon any Federal, State, or local agency any authority to regulate, control, or restrict any activities of the Commission." 42 U.S.C. Section 2018.

[183] "Sec. 272. Applicability of Federal Power Act. – Every licensee under this Act who holds a license from the Commission for a utilization or production facility for the generation of commercial electric energy under Section 103 and who transmits such electric energy in interstate commerce or sells it as wholesale in interstate commerce shall be subject to the regulatory provisions of the Federal Power Act." 42 U.S.C. Section 2019.

should be read as if the clause "to the extent therein provided" appeared at the end of the text.[184]

To hold that Congress specifically mandated a prelicensing antitrust review by NRC under Section 105c, but at the same time gave primary jurisdiction to the FPC or the SEC to make such antitrust determinations under more general public interest provisions of their regulatory statutes, would ignore the plain intent of Congress. As the Appeal Board has stated, "It was a key purpose of the prelicense review '. . . nip in the bud any incipient antitrust situation.' We can therefore perceive no valid reason why the Commission should wear blinders when confronted by such matters. No statute should be construed to render it ineffective."[185] If the rubric of primary jurisdiction is to be applied to any of these Federal agencies, it must be held that the NRC has primary jurisdiction of antitrust review for nuclear licensing purposes.

5. Business Justification

The "thrust upon" defense to the charge of monopolization is one of the legal issues in this case. The courts have recognized that monopoly as such is not unlawful, and that there is no violation of the Sherman Act where monopoly power has merely been "thrust upon" a company.[186] Monopoly power might be innocently acquired where demand is so limited that only a single large plant can economically supply it; when a change in taste or cost has driven out all but one supplier; or when one company out of several has survived merely by virtue of its superior skill, foresight and industry. "The successful competitor, having been urged to compete, must not be turned upon when he wins."[187] In *American Tobacco* the Court suggested the additional situation where a company has made a new discovery or is the original entrant into a new field and thus is unavoidably possessed of monopoly power.[188] And in *United Shoe Machinery* it was held that there was no statutory liability if the defendant bore

[184] H. R. Rep. No. 91-1470, reprinted in U. S. Code Cong. Serv. 5007 (1970).

[185] Wolf Creek, *supra*, 1 NRC 559 at 572-573. *See also Toledo Edison Co., et al.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), *Cleveland Electric Illuminating Co., et al.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-385, 5 NRC 321, 331-334 (March 23, 1977).

[186] A. D. Neale, *supra*, at 92-94, 105-112; 1955 Att'y. Gen. Rep. 56-60.

[187] *United States* v. *Aluminum Co. of America*, 147 F.2d 416, 429-430 (CA 2,1945).

[188] *American Tobacco Co.* v. *United States*, 328 U.S. 781, 786 (1946).

the burden of proving that its monopoly resulted solely from superior skill, economic or technological efficiency and the like.[189]

However, even in these cases companies were held to have monopolized (using the active verb) where the acquisition or retention of monopoly power was in part caused by business conduct having an anticompetitive or exclusionary effect. For example, in the *Pullman* case a contract pattern, legal in itself, nevertheless evidenced a purpose to retain a monopoly position.[190] And *ALCOA* was not deemed to be the passive beneficiary of a monopoly following the involuntary elimination of competitors by automatically operative economic forces, nor did its market control fall undesigned into its lap.[191] Similarly, *United Shoe Machinery's* control did not rest solely on its superior skill or the economies of scale. There were other barriers to competition which were erected by its own business policies, including the terms of its contracts and leasing arrangements.[192]

---

[189] "... the defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages, (including accessibility to raw materials or markets), economic or technological efficiency, (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law (including patents on one's own inventions, or franchises granted directly to the enterprise by a public authority)." *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 342 (D. Mass., 1953).

[190] *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E.D. Pa., 1943), final order 64 F. Supp. 108 (1946), *aff'd. per curiam* 330 U.S. 806 (1947).

[191] "There is no dispute as to this; 'ALCOA' avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. We need charge it with no moral derelictions after 1912; we may assume that all it claims for itself is true. The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that the question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent" 148 F.2d at 430-431.

[192] "But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more

Continued on next page.

Another asserted defense is based upon economic and business justification for the challenged conduct. In *Otter Tail* the refusal of a utility to sell or wheel wholesale power to its former municipal customers who converted to municipal systems was asserted to be "but the exercise of proper business judgment aimed at protecting the integrity of its business." (331 F. Supp. at 56) The Supreme Court disposed of this attempted business justification argument as follows:

> Otter Tail argues that, without the weapons which it used, more and more municipalities will turn to public power and Otter Tail will go downhill. The argument is a familiar one. It was made in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S Ct. 1856, a civil suit under Section 1 of the Sherman Act dealing with a restrictive distribution program and practices of a bicycle manufacturer. We said: "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." *Id.*, at 375, 18 L. Ed. 2d 1249.
>
> The same may properly be said of Section 2 cases under the Sherman Act. That Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collides with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power. [193]

However, it is also important to note that the Court did not ignore the business and economic realities inherent in the electric utility industry. It went on to state:

> We do not suggest, however, that the District Court, concluding that Otter Tail violated the antitrust laws, should be impervious to Otter Tail's assertion that compulsory interconnection or wheeling will erode its integrated system and threaten its capacity to serve adequately the public. As the

---

Continued from previous page.

important machines. The lease-only system of distributing complicated machines has many 'partnership' aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types. Yet, they are not practices which can be properly described as the inevitable consequences of ability, natural forces, or law. They represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster. They are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market" 110 F. Supp. at 344-345.

[193] 410 U.S. at 369-370.

dissent properly notes, the Commission may not order interconnection if to do so "would impair [the utility's] ability to render adequate service to its customers." 16 USC. Section 824a(b) [16 U.S.C.S. Section 824a(b)]. The District Court in this case found that the "pessimistic view" advanced in Otter Tail's "erosion study" "is not supported by the record" Furthermore, it concluded that "it does not appear that Bureau of Reclamation power is a serious threat to the defendant nor that it will be in the foreseeable future." Since the District Court has made future connections subject to Commission approval and in any event has retained jurisdiction to enable the parties to apply for "necessary or appropriate" relief and presumably will give effect to the policies embodied in the Federal Power Act, we cannot say under these circumstances that it has abused its discretion.[194]

Finally, although not controlling upon us and subject to modification or reversal on appeal, we note the following comment by the Alabama Public Service Commission on certain management decisions of the Applicant:

The final adjustment which the Commission finds necessary relates to failure of the Company – under the statutory duties imposed on it to operate under "efficient and economical management," – to take advantage of alternative methods of financing construction of the Joseph M. Farley Nuclear Plant. The Company's construction work in progress account has increased to the point that at the end of the test period in this case, CWIP amounted to approximately 57 percent of the depreciated original cost of the Company's electric plant in service. The capital supporting this CWIP gives rise to a tremendous carrying charge requirement in the form of debt interest, dividend requirements, etc., even though it produces no electricity nor contributes in any way to the present operations of Alabama Power. We are of the opinion and believe that this record shows that the proper exercising of "efficient and economical management" dictates that the Company take advantage of opportunities to divest itself of 25% of the Farley nuclear plant, either to Company affiliates or to the Rural Electric Cooperatives and municipal utilities. Such an action by the Company would make its rates more reasonable to the public.[195]

Having considered the legal elements which establish the standards under which we must make a finding as to whether it is reasonably probably that the Applicant's activities under the license would create or maintain a situation inconsistent with the antitrust laws or their clearly underlying policies, we must

---

[194] *Id.*, at 370.

[195] Opinion of the Alabama Public Service Commission in Docket No. 17094, July 12, 1976, at pp. 5-6.

now relate the facts to these legal standards. Since alleged anticompetitive conduct associated with monopolization must be viewed in the context of relevant product and geographic markets, we next consider the facts in this case related to such markets.

VII. THE RELEVANT MARKET

A. The Proposed Markets

A central issue in this proceeding is the scope of the relevant market or markets. Also in dispute is whether the delineation of relevant markets and the concomitant market share statistics have the same importance in a business setting subject to public utility regulation as market analysis does in monopoly and merger cases where government regulations on price, entry, and requirements to serve are not present. In our analysis of this issue the various positions of the parties first will be distinguished, followed by a discussion of the principles of delineating markets for proceedings such as this one. Finally, the market structure found by this Board will be described.

The Department argues that there are three different and distinct relevant markets which embrace the business activities of the Applicant. They are:

a. The retail distribution firm-power market. In this market, the buyers are ultimate consumers of electricity for residential, commercial or industrial use. The sellers are electric power companies engaged in the distribution of power, such as a municipally owned distribution system, or a rural cooperative. The Department argues that the geographic scope of the retail distribution firm-power market for this proceeding is central and south Alabama.

b. The wholesale-for-resale firm-power market. The demand side of this market consists of electric distribution systems such as a municipally owned distribution system, a rural cooperative, or the distribution component of a bulk power supplier that has vertically integrated forward. A seller would be a bulk power producer marketing to such entities. The purported geographic scope of this market is also central and south Alabama.

c. The market for power exchange services. In this market the buyers are bulk power producers as are the sellers. The transactions that comprise

this market consist of factors of production (or inputs) used in the production of firm bulk power. Examples of these would include the sale or exchange of transmission services, economy energy, staggered construction, reserve sharing, emergency and maintenance energy, and coordinated development of generation by joint ventures. The geographic scope of this market is suggested as embracing central and south Alabama, the regions bounded by the operating territories of the other Southern Companies, "and beyond" so as to include the exchange or sale of these factors of production with utilities contiguous to the operating companies of the Southern Company.

The two relevant markets urged upon this Board by the Staff mesh closely in their construction with the second and third proposed relevant markets of the Department. The Staff delineates a market for "bulk power supply" which is similar to the Department's wholesale-for-resale firm-power market in both its product and geographic dimensions. The Staff's second proposed market is that of "bulk power supply services," which parallels the Department's power exchange services. The Staff contends, however, that both markets are limited to Applicant's service territory of central and aouthern Alabama while the Department argues that the latter market is more expansive in its dimensions.

AEC concurs with the Department's market definition analysis as does the MEUA. The market share statistics that are derived from these definitions will be presented after summarizing Applicant's contentions on this issue.

The position of Applicant on the issue of relevant markets is threefold. First, Applicant argues that because of government regulation of the generation, transmission and distribution of electrical power, the conventional antitrust analysis of markets is vitiated or at lease made less useful for a proceeding such as this one. For example, Applicant views retail firm-power systems as natural monopolies for which competition between suppliers would be inappropriate, and argues that competitive forces acting upon transactions for wholesale firm power are minor. Secondly, Applicant believes that if any market shares for its business are to be calculated, they should be on a statewide basis. Finally, Applicant, rather than proposing its own definitive markets, has directed most of its analysis on this issue towards rebuttal of the relevant market proposals of the other parties in this proceeding, upon whom Applicant argues the burden rests for proving the existence of such markets.

The different market definitions naturally produce differing market shares for Applicant. Consider first the Department's statistics. Department witness Dr. Harold Wein calculated that Applicant held 84% of the retail sales of electricity in central and southern Alabama on the basis of demand, and 88% on the basis of energy. His estimates for 1972 are as follows:

CENTRAL AND SOUTHERN ALABAMA RETAIL SALES OF ELECTRICITY. 1972

	Demand (mw)	%	Energy (mwh x 1000)	%
Alabama Power Company	4,120	84	21,657	88
Municipal Systems	407	8	1,610	7
Distribution Cooperative	357	8	1,335	5
Alabama Electric Cooperatives	13	0	62	0
Total	4,897	100	24,664	100

(Wein, Direct, 67; Foltz, Tr. 12,841-12,843.)

Dr. Wein concluded that Applicant's share of the relevant wholesale market was even larger. His estimates for 1972 are as follows:

CENTRAL AND SOUTHERN ALABAMA WHOLESALE SALES OF ELECTRICITY. 1972

	Demand (mw)	%	Energy (mwh x 1000)	%
Alabama Power Company	4,577	93	23,313	95
Tennessee Valley Authority	47	1	227	1
Alabama Electric Cooperatives	195	4	765	3
Southeastern Power Admin.	78	2	359	1
Total	4,897	100	24,664	100

(Wein, Direct, 67; Foltz, Tr. 12,841-12,843.)

In its power exchange services market, the Department proffers no market share statistic for Applicant because there exists no common denominator in which all of the transactions in this alleged market can be quantified. Instead, the Department states that a key factor in gaining access to this market is the possession of high voltage and extra high voltage transmission lines. In the central and south portion of Alabama in 1973, AEC had 345 pole miles of 115 kv transmission lines and none higher. In contrast, Applicant had 4,355 miles of high voltage transmission lines of at least 115 kv and owns all of the lines which connect with bulk power supply entities outside the central and southern Alabama area (Wein, Direct, 72-73; APP. X 197; DJ 1,008). Because access to transmission is necessary (in the Department's view) to the power exchange services market, Applicant's dominance of transmission implies the ability to preclude rivals from access to this market.

Applicant claims that its status as a public utility under Alabama law imposes upon it the obligation to be willing to provide service at retail anywhere in

the state of Alabama but not beyond. It views the central and southern Alabama limitation as artificial. In 1972 total retail sales of electric power in Alabama were 41,185,000,000 kwh of which Applicant sold 21,657,000,000; this places Applicant's share at about 53%. The remainder is divided among TVA, AEC, and municipalities and cooperatives in the state (APP. X 196A).

In discussing its share of the wholesale bulk power business in Alabama, Applicant distinguishes between wholesale sales for resale and power transmitted to its own integrated distribution system. Note the distinction here. The Department's market analysis counts energy delivered by Applicant to its own retail distribution system as a wholesale transaction. Applicant excludes this power on the grounds that it involves no market "sales" and is not considered a wholesale transaction in industry parlance.[196]

Applicant's definition, applied to the entire state of Alabama, greatly reduces its share of the wholesale business compared to the Department's contention. In 1973, total wholesale sales, by Applicant's definition, amount to 10,783,000,000 kwh. Of this universe, TVA sold 72%, Applicant 17%, AEC 7%, and SEPA 3% (APP. X BJC-A, (Crawford) p. 130; APP. X BJC-36). If AEC were considered to control those wholesale sales which are physically supplied to its members by Applicant and SEPA, then the 1973 statewide share for Applicant drops to 12%. The difference between this 12% figure and the 95% figure proferred by the Department exemplify again the potential for statistical manipulation in relevant market delineation and the careful scrutiny such figures must receive before any conclusions can be derived from them.

B. The Role of Market Analysis

Because the parties in this proceeding are at odds not only in their definitions of the markets which should be considered by this Board, but also as to the use or weight that should be placed upon market analysis, it seems prudent first to discuss the rationale for market analysis in antitrust inquiries.

The concept of a *market* is an analytical construct, a theoretical device used so that complex reality might be better understood. The types of reality it endeavors to illuminate vary in their outward characteristics–witness the differences in an organized securities market, a local auction, and a union hiring hall.

But there are characteristics common to any market. There must be at least one buyer and one seller; there must exist a distinguishable product (or service) for which there are no close substitutes; and there must exist the ability (or the right) for the parties to strike a bargain with one another for this product. The

[196] Such sales are not reported as "sales for resale" by electric utilities such as Applicant to the Federal Power Commission which has regulatory jurisdiction over the sale of wholesale power of electric utilities (APP. X 97).

fact that there is only one buyer and many sellers (or vice versa) does not negate the existence of a market (as Applicant seems to contend), although the number of sellers or buyers will affect the economic model by which a market will be analyzed.

In antitrust analysis, a market also has a geographic dimension based on the locations of the actual (or likely potential) sellers and buyers of the product or service in question. In this nuclear licensing proceeding, to determine the geographic scope of any market, two questions must be answered: (1) where are Applicant's actual and likely potential customers? (2) what are the locations of other entities selling (or readily capable of selling) to these customers? Or to put the matter directly, what area can be bound in which customers of the product are purchasing little (or none) of the product from sellers outside the area *and* sellers of the product in the area are selling little (or none) of their product outside the area.

The exercise of defining the relevant market(s) in an antitrust proceeding is not an academic one nor is it offered merely for description. It is done for an analytical purpose. This purpose is to allow an inference, based on the structure of the market that is delineated, as to whether the defendant (or in this proceeding, Applicant) firm possesses monopoly power, that is, control over price or the ability to exclude entry.[197] In this proceeding, Applicant's position in the relevant market(s) is determined because it bears on Applicant's ability to carry out Farley license activities inconsistent with the antitrust laws. Obviously if Applicant operates in a relevant market found to have many rival sellers and easy entry by others, this Board would draw a different inference about its potential utilization of the Farley Plant than if it operates from a position of market dominance. Moreover, under the antitrust laws, this Board must look at Applicant's past behavior with different spectacles if Applicant operates from a position of dominance in the relevant market(s) than if it does not. Conduct acceptable by a firm with a small market share may be unlawful if carried out by a large firm in a different market setting.[197a]

Before describing the relevant market(s) for analysis here, there is one final matter to consider: Applicant's contention that market structure analysis is inappropriate in a business setting such as this one. This view is not at all implausible on the face of it. After all, the electric power business has often been viewed as a natural monopoly and producer activity has long been circumscribed by regulatory mechanisms not found in industries that historically have come under antitrust scrutiny.[198]

Specifically there are three features about the supply of electric power (for

[197] "Monopoly power is the power to control prices or exclude competition." *See United States* v. *E. I duPont de Nemours and Co.*, 351 U.S. 377, 391 (1956).

[197a] *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, ____ U.S. ____, 51 L.Ed. 2.d 80, 84 fn. 1 (1977).

[198] James E. Meeks, *supra* at 65-66.

a seller such as Applicant) which do not characterize sellers of products such as shoes, beer, or steel. The first is that the terms in which the product is sold are not solely the result of a bargain struck between the seller and the customer. Intervening in this price formation is a regulatory agency. In addition, the seller, unlike a conventional market situation, may not be free lawfully to transact with all customers who provide profitable opportunities, or to stop selling to customers who are financially unattractive. Finally, more than in many manufacturing and distribution industries, it is the opinion of many observers that there are extensive economies of scale in the generation and transmission of electric power. Consequently, sellers in this industry who first exploit or take advantage of these scale economies may, through free market forces, find themselves holding significant if not dominant market shares.

However, the existence of utility regulation in which prices, entry, or quality of service is controlled does not negate the existence of a market. There remain the requisite buyers and sellers. What is affected is the voluntary nature of the bargains that are struck between them. The existence of a regulatory agency inserts a wedge between the demand and supply sides of the market. The effect of this is not to eliminate the market but rather potentially to break the link between market structure analysis and the typical implications drawn in antitrust from such studies. The price at which electricity sells could be equal to, above, or below the competitive ideal. This height will be a function of the regulatory agency's activity perhaps more than being a function of the industry's structure on the supply side.

If regulation is more than a chimera, this means the structure of a regulated industry (such as electric power) may not produce the conduct and performance implications generally found in markets where price formation is the result only of bargaining between the supply and demand sides of the market. Applicant's contention in this regard is correct.

Where Applicant errs is concluding that because regulation, either by the FPC or the Alabama Public Service Commission, can break (or affect) the link between market structure and market conduct and performance, the reach of antitrust has also been broken or affected. Congress and the Courts have given this Board no such option. Indeed, as the Court held in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 368 (1963), "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." A similar view has been expressed by the Supreme Court in relation to the electric power industry.[199]

[199] "There is nothing in the legislative history [of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible with the public interest." *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374-375 (1973).

This means that the market analysis in this proceeding is unaffected by the performance, good or bad, pervasive or sketchy, of regulatory agencies controlling the economic behavior of Applicant, its rivals or its customers. Nor need we reach any judgment as to the efficacy of this regulation. The purpose of Section 105c, as indicated earlier, is to establish a market setting for the generation of nuclear power such that the objectives of the antitrust laws will be met and, indeed, so the very spirit of the institution of antitrust will be operative. Presumably Congress intended that the promotion of antitrust in this setting would minimize the need for regulation and serve to repair whatever inadequacies in such regulation might exist by maximizing the regulatory restraints produced by competitive forces.

Note also that regulatory constraints placed upon sellers as to whom they cannot serve (and whom they must serve) do not vitiate the usefulness of the market concept. For example, a geographic restriction which limits a seller to particular areas or a buyer to particular products is conceptually no different from a mountain range which precludes, by virtue of transportation costs, the interaction between some buyers and sellers and thereby places them in different markets.[200] At most the regulatory mechanism as it operates in this context serves to limit or demarcate the geographic scope of the relevant market.

Finally, the antitrust laws provide ample room for the defense of the firm whose dominant market position arises solely from the pursuit of legitimate, efficiency-inducing business behavior such as the exploitation of economies of scale (*ALCOA*).[201]

This has been a long route to reach the kitchen. But having stated the principles and role that market structure analysis plays in this proceeding, the depiction of the relevant markets can be articulated in a more succinct fashion.

C. The Market Relevant To This Proceeding

The record before this Board does not permit a ready or facile application of the principles just cited to delineate the market(s) relevant to this proceeding. The testimony on this issue was contradictory as between witnesses (if not, at times, by the same witness); and the briefs themselves were not without factual error and ambiguity. The Department's key witness on this issue, without gainsaying his broad experience, appeared to be locked in to particular market definitions (prior to his research on the case) which he himself was not completely comfortable defending. Moreover, given the importance the two Intervenors and Staff placed on the market structure issue, the Board has found it unfortunate that these parties seemingly were content to give such tractable

[200] The analogy is not perfect. A mountain range is not of infinite height and, at some price, goods (or customers) will move across it. A legal restriction may be insurmountable.

[201] *United States* v. *Aluminum Company of America*, 148 F.2d 416 (CA 2, 1945).

assent to the Department's contentions. The Board also felt itself handicapped by Applicant's notion that the responsibility for delineating a relevant market rested entirely with the other parties (see APP. PFF, p. 441). This view is itself incorrect. Former Board member Schwarz, at the reference Applicant cites (Tr. 2579) stated only that the Department has "a burden," not necessarily the sole burden in showing the appropriate market(s) which the Board should adopt.

This Board does find that a study of the record allows the demarcation of only one market for the purpose of analyzing Applicant's past conduct and its likely future behavior upon completion of the Farley Plant. This market is the one for bulk wholesale power in central and southern Alabama. Prior to outlining the product and the geographic dimensions of this market, we shall give the reasons for rejecting other alleged markets. Then the market for wholesale power in central and southern Alabama will be described and the implications of Applicant's position in it will be discussed.

1. Rejection of Bulk Power Supply Services

In the course of this lengthy proceeding, a substantial amount of direct testimony and cross-examination was devoted to the alleged existence of the so-called market of "power exchange services." The testimony of various witnesses was at times useful to this Board in understanding the phenomenona which underlay this protracted discussion. While we reject this particular market definition proffered by the Department, Staff, AEC and MEUA as a meaningful and useful category of analysis, we do note an important collection of inputs that, while certainly not comprising a market, do correlate with this proposed "market."

The confusion we find embedded in a market definition of "power exchange services" is that such a market clearly would include a variety of factors that in no way could be considered close substitutes for one another.[202] A bulk power producer who could benefit from reserved sharing would not find emergency energy a close substitute. A bulk power producer in need of maintenance energy would not find staggered construction a palatable alternative.[203] What is common to all of the elements in this alleged "market" is that they are

[202] Department's witness Wein at one point claims that relevant markets are determined by the criterion of substitutability but later admits that the services bundled under the rubric of a regional power exchange (or bulk power services) market are not substitutes (Tr. 13,655-13,656).

[203] Applicant's witness Pace is much closer to the mark in suggesting that, in addition to a market for long-term firm power, there exist two additional bulk power markets: (1) a market for emergency support, *i.e.*, immediate and short-run access to emergency capacity; (2) a market for short-term capacity purchases to remedy unexpected capacity shortfalls (APP. X J.D.P.-A (Pace) p. 59). However, this witness did not offer the quantitative dimensions of these alleged markets.

all important *inputs* into the efficient and reliable production of bulk power generation. But the elements are not usually close substitutes for one another, and hence, not in the same market.

By way of example, leather and stitching thread are both inputs into the production of shoes. But they are not substitutes for each other in the production of leather footwear and consequently are not part of the same market. That two firms have a common customer does not place the two sellers in the same market.

This Board realizes that under some circumstances there is authority for clustering diverse services sold by one type of firm together into one market, *United States v. Philadelphia National Bank*, 374 U.S. 321, 356 (1963). But in *Grinnell* the Court observed that the "reasonable interchangeability" test required consideration of substitute products.[204] The Court further spoke of "the low degree of differentiation required of substitute services as well as substitute articles," and concluded:

> There are, to be sure, substitutes for the accredited central station service. But none of them appears to operate on the same level as the central station service so as to meet the interchangeability test of the DuPont case.[205]

2. Rejection of the Proffered Retail Market

A second market proposed as being relevant to this proceeding is that of retail firm power in central and southern Alabama. This market, hereafter called the retail power market, is comprised on the supply side of electric utilities who distribute firm bulk power (either self-generated or purchased in the wholesale power market) over distribution lines located in a particular service area. The demand side of this market would consist of the ultimate consumers of electricity: generally households, farms, commercial businesses, and industrial establishments.

Retail firm power is clearly a distinct product market. Those consumers who are in the position of buying electricity for ultimate consumption do not have economical substitutes on the supply side. To be sure, for many purposes some cross-elasticity of demand with other energy sources exists. A homeowner may be able to shop between electricity and gas for residential heating; a business enterprise may confront a meaningful choice between using internal combustion engines or electric motors for a particular production process. But for

---

[204] *United States* v. *Grinnell Corporation* 384 U.S. 563, 573 (1966).

[205] The relevant market is to comprise ". . . commodities reasonably interchangeable by consumers for the same purposes. . . ." *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

many, many purposes, electricity provides the only realistic alternative for the operation or functioning of various mechanisms. No other sellers of energy can offer a meaningful substitute. Because of this, the market for retail power can be clearly delineated as to its product characteristics. Applicant is a seller of retail power in central and south Alabama. In 1972, it sold 21.7 billion kwh (Wein, Direct, p. 67).

A case can be made that there is competition among retail sellers of electricity in central and south Alabama. There is evidence in this record of limited rivalry between retail utilities. Some of the rivalry is even actual head-to-head, street-to-street competition (such as in the city of Samson; Wein, Direct, p. 89). There is also some competition for new loads and for customers in the interstices of the service areas of retail distribution systems. In addition the concept of yardstick competition undoubtedly plays some role in the minds and in the behavior of distribution entities. And possibly the yardstick most often used in measuring the performance of any retail distribution system in central and south Alabama is that of another distribution entity in the same area. But the Board nevertheless rejects the proposed market for retail firm power in central and south Alabama proposed by the Department, MEUA, and AEC (but not the Staff).

The Board has surveyed and resurveyed the evidence of competition among retail distribution systems in central and south Alabama. Our reaction to this as constituting one singular market is similar to King Agrippa's when preached to by the Apostle Paul: "almost thou persuadest me" (Acts 26:28). But not quite.

The fact is that most buyers at retail of electricity anywhere in central and south Alabama have little choice on the supply side (short of moving) than the one seller supplying that service territory where they live.[206] Moreover, few retail sales by any distribution entity are made outside the seller's territory (almost by definition). Furthermore, the prospects of one distribution entity selling within another utility's service area are slim – and economically wasteful to boot. Applicant has contended that the distribution of power at retail is a natural monopoly (APP. X JDP, (Pace) p. 5; *see also* Wein, Direct, pp. 51-52). For the purposes of this proceeding, we concur. As the Court in *Otter Tail* found, "Each town . . . generally can accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail." *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 369 (1973). There exists rivalry among retail sellers. But it is inframarginal in proportions, not adequate to bind all the sellers of electricity at retail in central and south Alabama into one geographic market (APP. X BJC,(Crawford) pp.

[206] Department's witness Wein even concedes that customers of a given distribution entity are "captive" to it "unless they move out of town" (Wein, Tr. 12,503).

21-51, 61-118).[207] In no way can the distribution entity at Tuskegee be considered as a meaningful rival for the retail customers of the distribution system in Evergreen.[208]

The markets at retail that do exist in central and south Alabama would constitute the many different distribution systems existing there and the respective service areas of each. Any given distribution system, be it a municipal, a cooperative or Applicant, would supply essentially 100% of the retail electricity consumed in each market. But it would serve no purpose to delineate and identify each of these separately as a market since what is happening in each of these markets, where the distribution system is the seller, is of little consequence for this proceeding. Competition *between* retail distribution systems, if it is of only inframarginal proportions, is presumably outside of the scope of antitrust remedy.

This is not to say that the economic viability of retail distribution systems is outside the reach of the antitrust laws or beyond the pale of this Board's concern. Quite the contrary. In *Otter Tail*, the Court unambiguously manifested a concern with the economic viability of the retail distribution function in the electric power industry.[209] But in that case, the Court scrutinized the distribution entity's ability (or potential ability) to survive and prosper in the face of obstacles it encountered as a *purchaser* of bulk power, *i.e.*, the focus has been upon the retail distribution entity as a buyer (or potential buyer) in the wholesale power market.

In *Otter Tail*, every anticompetitive practice performed by the defendant related directly to the ability of a retail distribution system (either proposed or existing) to establish itself as a buyer in the wholesale power market. The Court cited four obstacles municipal distribution systems faced in gaining access to the wholesale market as buyers:

(1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power;

(2) refusals to "wheel" power to such systems, that is to say, to transfer by direct transmission or displacement electric power from one utility to another over the facilities of an intermediate utility;

---

[207] Applicant's witness Crawford, in addition to relating the scope of territorial agreements and nonduplication understanding as between distribution entities, also relates the extend of duplicative lines in central and southern Alabama. Of almost 75,000 miles of distribution line operated by Applicant and rural cooperatives, about 130 miles were duplicative (.00175%) (APP. X BJC-A, (Crawford) pp. 35-36).

[208] It is curious, if not disingenuous, for MEUA and AEC to argue for a near statewide relevant market for retail power given the evidence in this proceeding of their efforts to protect their service territories from competitive intrusion (see St. John, cross by Applicant, Tr. 2920-3313).

[209] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). See also *Gulf States Utilities* v. *Federal Power Commission*, 411 U.S. 747 (1973).

(3) the institution and support of litigation designed to prevent or delay establishment of those systems; and

(4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems. 410 U.S. at 368.

Likewise, the relief decree of the District Court, in every facet, affected retail distribution systems in their access to and role as buyers in the market for bulk wholesale power.

This leads us, then, to that market which is singularly relevant for the licensing of nuclear facilities to generate electricity: the market for wholesale power.

3. Market for Wholesale Power

The market for wholesale bulk power (hereafter the wholesale power market) comprises electric utilities on both the demand and supply sides of the marketplace. Sellers are those entities generating and providing bulk electric power to distribution entities who are intending to retail this power. Some of the basic production inputs needed for efficient and reliable supply in this market consist of generating plants, bulk power supply services, and transmission lines (unless the buyer is able to supply the latter factor of production).

Competition in such a market would take the form of sellers trying to render superior service to their current utility customers (in order to retain them) and seeking the business of other utility customers who may be currently served by rival sellers of wholesale power. Competition, if only potential, also may take the form of distribution systems, solely or jointly, considering integration backwards into the development of their own generation capacity.

Wholesale power is clearly a distinct product market. Those who are in the position of buying and reselling electrical power do not have economical alternatives on the supply side for wholesale power. No other sellers of energy can offer a meaningful substitute product. For example, a municipal distribution system, short of vertical integration backwards into generation, is dependent entirely upon sellers of wholesale electric power. Because of this the market for wholesale power is a relevant one for antitrust analysis.

4. Defining a Sale in this Market

Applicant is clearly a seller in this market. How much it sells, and therefore its market share, is not however unambiguously apparent. This hinges upon the rather narrow question of how a "sale" or market transaction is defined.

A fundamental distinction in law, economics and common parlance is that drawn between transactions within a firm and those between firms. When a worker assembling toasters puts on the base plate and the device then passes to the next worker for the installation of the cord, no one would argue that a sale or market transaction has taken place between the two employees of the firm. A market transaction *has* occurred when the toaster leaves the factory and is sold, say, to a department store. In the assembly of the toaster, a theory of firm behavior may be needed to understand the economics involved; in the sale of the toaster a theory of markets would be appropriate.

In like fashion when Applicant moves bulk power generated by itself to one of its own retail distribution centers, it insists a market transaction has not occurred. Applicant contends that only when it sells bulk power to an entity like AEC is a market transaction involved, for Applicant is then a supplier making sales in a wholesale power market.[210] Contrary to this, as mentioned earlier, Applicant's opponents count as "sales" the power delivered to Applicant's 639 retail distribution systems.[211]

But Applicant's contention both cuts for it and against it. It cuts for it in this way. If the Applicant's vertically integrated structure means that no "sale" takes place between the function of generation and distribution, so that there is no "market" to its own distribution systems, then an enormous amount of electrical power (for which Applicant is the seller) is precluded from the market share calculation.

---

[210] Moreover Applicant seems to be arguing that even if such a sale were to take place at a "shadow" price within the firm, it still would not be part of any wholesale market because Applicant's distribution systems are "captive," *i.e.*, there is no meaningful competition from other sellers for their business.

[211] Although it should be indicated even Department witness Steitz conceded unfamiliarity with the notion of imputing a vertically integrated utility's retail sales as wholesale transactions. At pages 12,706-12,707 of the transcript the following (edited) coloquy took place.

Q (by Mr. Balch): Have you ever seen such treatment of market data in any previous work you have ever done for any clients?

The Witness: No sir. . . . We have not seen it before.

Q (by Mr. Balch): Have you ever seen in any publications dealing with market data relating to the electric utility business, or any agency such as the Federal Power Commission, Kansas Public Service Commission, EEI, or the publishers of Electrical World – anybody has ever undertaken to treat as wholesale sales, and included in the development related to wholesale sales, transactions involving retail sales?

The Witness: Mr. Balch, to the best of my knowledge, I don't remember specifically seeing information compiled as we have done here.

Such a line of reasoning cuts against Applicant in this way. If Applicant's distribution systems are not to be counted among the market for wholesale power, then the generation or sale of power by AEC to its own members could be excluded for the same reason. Applicant's franchise of its distribution systems is arguably no different than AEC's control over its members (See Tr. pp. 23,504-23,507; AEC X-3, (Lowman) pp. 104-106). Indeed AEC claims that it *is* its members, by virtue of being a membership cooperative. This would mean that while AEC is a buyer in the wholesale power market in central and south Alabama (because of its more limited vertical integration), it is not a seller at wholesale. If the geographic market of central and south Alabama is appropriately defined, then apart from a small amount of TVA and SEPA power being sold in this area, Applicant would be virtually the sole occupant on the supply side of this market. It becomes far and away the dominant firm.

Were the Board to adopt this definition of a wholesale transaction, the only sellers other than Applicant of wholesale power in central and south Alabama would be TVA and SEPA. TVA, with facilities in seven states, sells wholesale power in two cities in central and south Alabama: Bessemer and Tarrant City (DJ 1,007). SEPA, an agency of the Department of the Interior, sells surplus power from the Corps of Engineers, some of which is marketed in central and south Alabama to retail distribution systems (Fortune, Tr. 14,689).

The Board, after giving much attention to this issue, does not adopt such a strict definition of "sale" and instead, includes the supply of power by a generating entity to its "captive" and on-system member distribution entities as a wholesale transaction to be considered as well. This functional rather than literal approach will be explained after indicating why the Board has adopted a central and south Alabama market definition.

5. The Scope of the Market's Geography

This market's geographic contours follow directly from the principles cited earlier and, it turns out, would include the same area regardless of the alternative definition selected for a wholesale power transaction.

Applicant sells no bulk firm power to distribution systems located outside central and south Alabama, either to captive or independent entities. If AEC is considered a seller of wholesale power, its sales are confined almost exclusively to this same region.[212] So the bulk power suppliers located in central and south Alabama (whether Applicant alone or Applicant and AEC) sell very little power outside this geographical area.

[212] AEC does sell some power into the panhandle area of Florida to its member cooperative Choctawhatchee Electric Cooperative. This distribution entity also is a customer of the Gulf Power Company. In addition Choctawhatchee operates a diminutive (10 mw gas turbine) generating plant – which constitutes less than 10% of AEC's generating capacity.

It is true that there are two suppliers of wholesale power to central and south Alabama located outside the area: TVA and SEPA. The relative size of their sales alone might serve to disqualify their influence and therefore their inclusion in the market. But it is the particular characteristics of their sales that give this Board no difficulty in excluding them, and therefore, in rejecting Applicant's contention that an Alabama statewide region be adopted for purposes of analyzing wholesale sales.

The entire state of Alabama would be an appropriate geographic market area only if wholesale suppliers in northern Alabama (TVA is the obvious entity involved here) could compete for retail loads in central and southern Alabama and Applicant could sell in the eleven northermost counties of the state as well. Such is not the case.

The Applicant's chances of selling in the northern eleven counties in the immediate future are slim, albeit greater than TVA selling south (APP. X J.M.F.-A, (Farley) pp. 206-207; Farley, Tr. p. 20,566). Applicant holds itself out to serve anywhere it is chartered in the State of Alabama and there is some testimony to the effect that Applicant might become more competitive with TVA for the latter's wholesale business (Wein, Direct, pp. 65-66). But Applicant clearly is not a vigorous contender for wholesale business in the TVA area (Tr. 23,809-23,816).[213]

Moreover to delineate accurately a statewide market for wholesale power to fit the purposes of this inquiry would entail the northern based supplier TVA to be at least a likely potential source of supply in central and south Alabama. Short of statutory change, this is impossible. A 1959 Act of Congress limits TVA's sale or distribution of power to those areas it served on July 1, 1957, 16 U.S.C. Section 831n-4a. Not only is TVA unlikely to come south (and Applicant is making no plans to go north), Applicant actually delivers the power TVA sells in central and southern Alabama to the TVA substations at Bessemer and Tarrant City (Tr. 20,567). Save for load growth in these two cities, TVA cannot become a more substantial source of supply in this market.

SEPA supplied approximately 150 mw of wholesale power in central and southern Alabama in 1973 from the Walter F. George dam on the Chattahoochie river which bounds Alabama and Georgia (Wein, Direct, p. 68A). But it is clearly a hybrid seller of wholesale power with limited growth prospects in this market (St. John, Direct, p. 8). Because of its size, its growth potential, and the fact that its wholesale power is not firm power in the conventional sense of that term (Wein, Direct, p. 92; St. John, Tr. 4,263-4,270), it would be illogical if its operations outside of central and southern Alabama would suffice to expand the

[213] In response to one question from the Board about Applicant's seeking to serve customers in the eleven northernmost counties, Applicant's witness Crawford replied, "No. sir. We have never, to my knowledge. We have never called on them with the idea of trying to get them to change service to Alabama Power Company" (Tr. 23,810).

relevant geographic market in this proceeding beyond the central and southern Alabama boundaries. [214]

In short, it is because of the pattern of demand and supply that we find Applicant's sales of wholesale power to be in a geographic market of central and southern Alabama. The bulk power suppliers located in the area (Applicant and AEC) sell very little power outside the region. Moreover, the actual suppliers located outside the area (TVA and SEPA) do limited and peculiar business inside. The other utilities adjacent to the Applicant are operating companies of the Southern Company (Georgia Power, Mississippi Power, and Gulf Power) and are not currently a competitive factor, actual or potential, in central and southern Alabama; nor is Applicant a factor in their supply areas (APP. X J.H.M.-A, (Miller) pp. 120-121; Farley, Tr. 19,074-19,007).

6. The Functional Nature of the Wholesale Power Market

The reasons for considering a wholesale market with the unusual configuration of including sales to captive or member distribution systems are twofold.

The first is because the supply of firm bulk power to any retail distribution system, even if not transacted at a money price within a vertically integrated business stratification, does encompass two different and widely recognized functions. The functional view of the electrical power industry is: generation, transmission and distribution. Consequently, the shadow price at which bulk firm power may be supplied to a captive or member distribution system is a wholly different animal from the shadow price at which, say, a toaster without a cord is supplied from one employee to the next one who attaches the cord to the appliance. This is a key distinction in defining the market this way. One must rise to the realm of abstraction and speculation to imagine a firm selling a toaster without a cord to another firm that attaches the cord. One need not rise to such a realm of abstraction or speculation to imagine two firms selling and buying wholesale power with each other. This happens. So, for one, there is a functional reason for viewing Applicant's and AEC's sales to seemingly "captive" entities as constituting wholesale sales (*see* J. Hirshleifer, "On the Economics of Transfer Pricing," 29 *Journal of Business* 172 (1956)).

The second reason is because in this proceeding, it is a contention of Applicant's opponents that the limited competition that might now exist for retail loads, even captive, or those of AEC members, could become more vigorous with the appropriate licensing conditions to the Farley units. Indeed, one need not read between the lines in this case to see the Department's vision of a market

[214] SEPA can provide no more than 20% of any utility's load as of 1968 (St. John, Direct, p. 8; Tr. p. 4,261).

where retail systems shop both in and outside the central and southern Alabama area for wholesale power.[215] Since such competition could involve the shifting of retail loads among different suppliers, it is prudent that this Board examine whether Applicant's share in such a market might already be so insignificant as to constitute no antitrust problem.

We are mindful of Applicant's contentions that there is little evidence of a fluid shifting of retail loads among wholesale suppliers in central and southern Alabama. And we are aware that actions by Intervenor AEC, in the form of its 35 and 40-year all-requirements contracts, only limit further the potential for competition at wholesale. The Board is persuaded by the record in this proceeding that the rate of turnover among buyers and sellers common in many other markets will not become the order of the day in this one.[216] By way of comparison, department stores can and do shift between toaster suppliers (and toaster manufacturers between department stores) with much more ease and regularity than an electrical distribution system, especially one with membership ties or perpetual franchise, could shift to a new supplier of wholesale power.

Competition for wholesale loads that have actually resulted in changes in supplier include the situations in Evergreen, Luverne and Troy where AEC lost business to Applicant (DJ 4,277-4,297; DJ 207; DJ 4,337). Other examples of such competition in central and south Alabama could be cited (St. John, Direct, pp. 10-14; DJ 4,298; DJ 4,301-4,302; DJ 4,308-4,311; DJ 6,041; Tr. 23,477-23,487).[217] But there is no gainsaying the obstacles to such competition. A municipality served by Applicant under a franchise cannot shift easily to AEC; an AEC member cannot shift readily to Applicant for wholesale power. Clearly we are talking about competition at the margin here. As Applicant's witness Crawford testified in response to a question as to whether there was competition for wholesale loads: "The answer to that question is a qualified yes" (APP. X BJC-A, (Crawford) p. 131).

Yet one of the lessons of economics is the importance and efficacy of marginal adjustments. In economic matters, tails often do wag dogs. In this

---

[215] One seeming anomaly in this case is that, while arguing that Applicant has thwarted the development of rival generation on the supply side of the market and sought to lock up retail loads for itself on the demand side of this market, the Department has, at the same time, allied itself with a party (AEC) which, in its 35 and 40-year all-requirements contracts with its members, has carried out the very business practice objected to by the Department (see Crawford, Ex 38). However, this is not an inquiry into the practices of AEC, and the doctrine of *in pari delicto* has no vitality in this case. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

[216] For evidence on this see Joe D. Pace, "Relevant Markets And The Nature Of Competition In The Electric Utility Industry," 16 *Antitrust Bulletin* 725, 767-757 (1971).

[217] The resolute manner in which Applicant and AEC have participated in this proceeding is itself evidence of their potential, if not actual, competition for wholesale loads.

market setting, it is precisely because buyers are often locked into one seller, and a seller limited to a definite geographic area for its retail customers, that the "tail wag" should be preserved. It represents one outlet for the limited competition possible in electric power supply. It is the very type of competition that, in regulated or quasinatural monopoly settings, the antitrust laws should be especially zealous to maintain, either to mitigate any undesirable effects of the market structure or the shortcomings of regulatory authorities. The preservation of this rivalry would seem to require the existence of a number of different buyers and sellers (although not at the expense of economic efficiency).

7. Applicant's Market Share

As indicated, Applicant's share of the wholesale power market in central and south Alabama is in part a function of how a sale is defined. The basic alternatives are these:

a. Power generated by Applicant and sold at retail by Applicant is counted as a sale in the wholesale power market along with all other "sales for resale" by the Applicant (except sales to AEC).[218] This means Applicant's sales include those to its own "captive" distribution systems; to the two independent cooperatives and 15 non-AEC municipals it serves; and Applicant's sales to nine members of AEC.[219] The only other source of supply in this market configuration is the generation and transmission cooperative AEC, selling power which it generates itself or purchases as supplemental firm power from Applicant and supplies to 13 of its members (those on-system). Applicant's share of the market, under this alternative, in 1974 was approximately 96 percent. It remains at approximately 96 percent even if SEPA power to AEC were included in the calculation.

b. As a second alternative, Applicant's power supply to its own distribution system is not characterized as a wholesale transaction (as Applicant contends it should not be); but in like fashion power "sold" by AEC to its on-system members also is not counted as a wholesale

[218] AEC's purchases from Applicant of "firm power supplementing [its] own generation" are not viewed as a wholesale transaction in this market, but rather as an input purchase by AEC which facilitates its position as a supply entity in the wholesale power market in central and south Alabama. See APP. X 97, Account 447, Sales for Resale in Applicant's Annual Report to the Federal Power Commission.

[219] The nine members (5 off-system and 4 on-system) take power directly from Applicant-served delivery points. While AEC itself serves as the purchasing and billing agent for these transactions, physically it is not the supplier of the power.

transaction. Under this market configuration, of course, Applicant's share of the wholesale power market is 100 percent.[220]

c. A third alternative also follows Applicant's contention that power supplied by it to its own distribution entities does not constitute a wholesale transaction. In this calculation, only Applicant's "sales for resale," as recorded in its annual report to the Federal Power Commission, will constitute wholesale transactions.[221] AEC's wholesale sales are tabulated as including all of the power, whether self-generated or purchased as supplemental firm power from Applicant, to its on-system members.[222] This method, of course, has a double count. Power from Applicant supplied to an AEC delivery point constitutes a wholesale "sale" by Applicant to AEC. AEC then is viewed as selling this same power to its on-system members, along with that which AEC itself generates. In some cases then, there are two levels of wholesale-for-resale transactions: from Applicant to AEC; from AEC to an AEC on-system member. Applicant's share of this wholesale market would be approximately 74 percent.

(d) There is still a fourth alternative which the Board considered. By this method, Applicant's wholesale sales are counted the same as in (c) above, *i.e.*, all of its "sales for resale" as reported on FPC Form 1 to the Federal Power Commission. The entire market in this characterization consists of these sales by Applicant plus all of the wholesale power for which AEC is the billing and purchasing agent, *i.e.*, its "total sales for resale" as tabulated on its Operating Report to the Rural Electrification Administration.[223] Even this depiction, which emphasizes forms over substance, yields Applicant approximately a 59 percent market share.

---

[220] Applicant's market share consists of its wholesale sales to the two non-AEC cooperatives, plus the 15 municipalities it serves; and its sales both to AEC as supplemental firm power and sales to Applicant-served delivery points of AEC members for which AEC serves as the purchasing and billing agent. The denominator of the fraction would consist of the same set of figures. This percentage calculation excludes from the denominator the SEPA and TVA power marketed in central and south Alabama for the reasons cited earlier. Even if SEPA power were included, Applicant's market share would drop only slightly.

[221] Including Applicant's sales to AEC.

[222] The treatment of AEC being based, arguably in this instance, on the greater independence of a member of AEC to sever its ties with AEC as a generating and transmission cooperative (compared to Applicant's "captive" distribution systems) and the history of some AEC members having left the cooperative.

[223] This encompasses the power AEC takes from Applicant at its own delivery points for resale to its on-system members, the power it self-generates for resale to its on-system members, and the power generated by Applicant for AEC's off-system members but for which AEC serves as the purchasing agent. See APP. X 146.

The unusual feature about this cake is that no matter how it is sliced, Applicant gets by far the largest piece. This holds even if a generous downward adjustment is made to account for the SEPA and TVA power in central and south Alabama.[224] Applicant's possession of the preponderant market share under each alternative is in contradistinction to what frequently happens in antitrust litigation where the adoption by the court of one alternative market versus another greatly alters the magnitude of the market share statistic.[225] Of the four alternatives just described, the Board finds the first the most illuminating.

There exists still another measure of Applicant's share of the wholesale power market in central and south Alabama, not based on sales, which also influences this Board. Given the dissonance and discrepancy among the parties as to precisely what constitutes sales of wholesale power, the Board also considered a proxy for Applicant's share in the wholesale power market: its control of generating capacity.

Applicant's generating capacity in 1974 was 6,246 mw (APP. X JHM-A, (Miller) pp. 12-18; APP. X JHM-2).[226] It has additional planned capacity scheduled to be operative as of 1979 of 2,380 mw, of which 1,720 mw (the two Farley units) will be nuclear. Applicant generates all of the power for its retail power needs.

In contrast, AEC had generating capacity in 1974 of 137 mw, with a total planned capacity of 557 mw scheduled by 1979 (Lowman, Tr. 8,615-8,617, 26,398-26,400; AEC X CRL 1A; APP. X 146). AEC currently generates power delivered to its members. It supplies the entire bulk power requirements of three of its 14 cooperative members, its two industrial members, and its four municipal members.[227] In 1974, AEC generated 346,500 mwh of energy, all of which was delivered to utilities in central and south Alabama, with one excep-

---

[224] A meticulous calculation of Applicant's market share would be adjusted upward to account for the two AEC industrial members, Micolas Cotton Mills and Opp Cotton Mills, who are not strictly retail loads. These two industrial loads have been members of AEC since 1944 (Lowman, Direct. p. 4); but AEC is no longer interested in selling at retail except through member cooperative or municipal systems (APP. X BJC-A, (Crawford) pp. 10-12). And Applicant's share could also be adjusted slightly to account for the fact that AEC sells a small amount of power in Florida which is outside of the relevant market. As the Courts have made clear, such statistical punctiliousness is not required. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549 (1966).

[225] As in *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956).

[226] This includes Applicant's 60% share of the Greene County Steam Plant and its 50% share of the Ernest C. Gaston Plant.

[227] These are, respectively, Covington Electric Cooperative, South Alabama Electric Cooperative, and Southern Pine Electric Cooperative; Opp and Micolas Mills; Andalusia, Brundidge, Elba and Opp.

tion: Choctawhatchee Electric Cooperative in the Florida panhandle which also bought power from Gulf Power.

Disregarding the SEPA and TVA capacity utilized in central and southern Alabama, Applicant holds approximately 98% of the generating capacity in this part of that state. This is a crude but useful measure of its market share as a supplier in the wholesale power market.

8. The Implications of Applicant's Market Share

On the face of it, any market share of Applicant is impressive. But such numbers must be placed in two contexts. The first is that of the industry setting. The second is that of the law.

In the context of this industry, where even ardent proponents of antitrust application must concede the existence of marked economies of scale in both generation and transmission, high market shares do not evoke the same monopoly concern that would certainly exist if the identical market structure existed in scores of other industries.[228] The antitrust laws promote competition to secure efficiency in resource utilization. Where efficiency dictates the exploitation of enormous economics of scale, high market shares are to be expected. On the one hand, the market share of Applicant, standing by itself, is not damning.

On the other hand, it is. The reason, paradoxically, relates also to the peculiar technology of production on the supply side of this market and the degree of control this might give Applicant over certain key inputs (or factors of production) used in this market.

As mentioned earlier, the factors of production needed on the supply side of the wholesale power market include generating facilities (*i.e.* nuclear, hydro, or fossil fueled), a bundle of inputs called bulk power supply services, and transmission lines.[229]

The unusual characteristic of Applicant, shared by other large integrated utilities, is that as an important seller in the wholesale power market, it is also an important *seller* (as well as buyer) of *inputs* for the production of wholesale power. It is this characteristic that reinforces the market position attributable to Applicant's mere statistical share of the market.

It is as if a shoe manufacturer, with a given percentage of the market, in the making of shoes somehow came to control or significantly influence the supply of shoe leather (an essential input in the production of shoes) to its immediate shoe manufacturer rivals.

---

[228] As Department's witness Wein admitted: "It is well known to students of the industry, and it is amply documented in the National Power Survey, that economies of scale exist in the generation and transmission of electric power." Wein, Direct, pp. 49-51.

[229] Unless the distribution system owns or has access to transmission lines itself.

In its competition for sales of wholesale power with AEC as a generating utility, or in its potential competition with distribution systems in central and south Alabama which are considering integrating backwards into generation, Applicant is in a position to influence their access to a number of basic inputs: those falling under the rubric of bulk power supply services and transmission services (Applicant does not produce and sell generating facilities to other utilities).

Quite apart from their importance in the production of economical and reliable firm bulk power, bulk power supply services are an extraordinary set of inputs. One reason, already cited, is that generating utilities with full access to these inputs will likely be both a buyer *and* a seller of them. This clearly differs from most inputs where a firm is either a seller *or* a buyer of the factor of production. Moreoever, the sales of these inputs are often not consummated at a money price. One producer may provide emergency energy as an input to another producer's bulk power production in exchange for the same service being rendered in return by the initial recipient. The result is the existence of swapping, complex *quid pro quo* arrangements, and other trappings of barter transactions with the "price" being expressed as one input in terms of exchange for another. Reserve sharing may be the starkest example of this.

A third unusual feature of these inputs is that their sale and purchase can be effectuated through facilities already in place between buyers and sellers, *i.e.*, facilities existing because of other contractual relations utilities have for the sale or exchange of bulk power in the wholesale power market. Or the exchange of inputs may require agreements about new capital facilities before these inputs can be made accessible to one party or the other. In addition, the exchange of inputs may be dependent upon one utility being able and willing to transmit some of these factors of production over its transmission facilities before a buyer can secure the input (or can sell its own such services as it produces bulk power).[230]

In addition to bulk power supply services, transmission lines constitute a second input into the production of efficient, reliable wholesale power and so it is pertinent to note the dominance Applicant has over this input. Apart from the tiny proportion operated by the municipalities of Foley and Fairhope, AEC is the only other utility with transmission facilities in central and south Alabama. AEC's 995 miles (which is at generally lower voltage levels) is 15% that of the Applicant's and, as mentioned earlier, Applicant owns all transmission lines in the market over 115 kv and, importantly, controls all transmission facilities

[230] Some of these inputs - such as staggered construction - are not physical in nature. Then access is available only to those who can enter the negotiation process for securing or selling such inputs.

providing access to utilities outside the market area (DJ 1,000; DJ 1,006; DJ 1,008; AEC X CRL 1A; St. John, Direct, pp. 7, 39).

In the Court's opinion in *Grinnell*, two criteria were cited as determinative of a situation condemed by the Sherman Act:

> The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen or historic accident. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966).

This Board holds that the first test has been met as to Applicant's market share in the wholesale power market in central and south Alabama. Applicant's opponents have failed in showing the requisite market position in their alleged markets for bulk power supply services and retail firm power.

This too has been a long excursion, and not an easy one. But it takes us to Applicant's conduct which the Board sees as the heart of the matter. The potential for behavior inconsistent with the antitrust laws can be inferred by reference to Applicant's share of those markets in which it operates. The past business conduct of the Applicant also illuminates any market power it holds. A seller whose conduct reveals that it can consistently exclude competitors or control prices has monopoly power, whether its market share statistics bear this out or not. Because of the ample record developed on the conduct of Applicant, and the complexities of developing market share statistics in this industry setting, the Board holds that evidence on market structure has only ancillary importance in this proceeding compared to evidence on market conduct. Applicant's record in this regard will be determinative as to whether it has abused its market position or has come upon it through the legitimate exercise of economical business operations and is thereby protected by both the two-pronged monopoly test of *Grinnell* just cited and the "thrust upon" defense provided in *ALCOA*.

VIII. APPLICANT'S CONDUCT WHICH IS ASSERTED TO BE INCONSISTENT WITH THE ANTITRUST LAWS

Now to the heart of the case. The Department, AEC, MEUA and the Staff all contend that Applicant has monopoly power – the power to control prices and exclude competitors in the markets for wholesale and retail sales in central and southern Alabama and in the market for power exchange services in that area and beyond. They also claim Applicant has control of high voltage transmission lines which permits Applicant to maintain and extend its monopoly power. These parties state that Applicant has misused its monopoly power in order to

stifle competition, and to maintain and enhance its position in the wholesale and retail markets [231] in central and southern Alabama for electric sales.

In support of these principal contentions, the Department and the others point to a number of instances involving Applicant's conduct as representing the misuse of its monopoly power. The Board has examined each of these alleged instances of Applicant's misuse of its monopoly power to ascertain whether they represent a pattern of anticompetitive conduct in the context of the activities under the licenses for the Farley Plant. In our examination of the alleged occurences, we, of course, considered the demeanor and credibility of the witnesses who gave pertinent testimony.

A. Applicant's Efforts to Prevent AEC From Installing Its Own Generation

The Department and the other parties to this proceeding first claim that Applicant has successfully prevented AEC from installing its own generation. They cite two periods in AEC's history when, it is asserted, Applicant took various steps, including the commencement of legal and administrative proceedings, to "torpedo" AEC's plans to construct new generating facilities. The first of these alleged efforts occurred in the 1940's. The second occurred in the early 1960's. It is contended that these efforts were anticompetitive.

1. The 1940's

AEC had its genesis in 1941, when several rural distribution electric cooperatives in the southern part of Alabama formed AEC to provide rural electric distribution cooperatives with an alternative source of electric power (Lowman, Direct, pp. 2-4). AEC was incorporated on June 24, 1941 (APP. X 145).

Shortly thereafter, AEC applied for and received approval of a loan of $2.5 million from the Rural Electrification Administration (REA) to construct new generation facilities. Applicant made inquiry about the grant of the loan at REA, but only after it had been approved (AEC X 3, (Lowman) pp. 12-15; AEC X CRL-5). AEC then made application to the Director of Finance of the State of Alabama for approval to issue a promissory note to REA for the loan. Under Alabama law,[232] AEC was (and is) required to obtain the approval of the State's Director of Finance before issuing any evidence of indebtedness. The Director of Finance deferred granting his consent to the issuance of a promissory note by AEC for the REA loan at this time, pending guidance from the Federal Supply

[231] As indicated in the preceding portion of this Initial Decision, the Board rejects the retail market as a relevant market for purposes of measuring Applicant's conduct. See pp. 887-890, *supra*.

[232] Title 55, Section 155, Code of Alabama 1940 (Recomp. 1958).

Priorities and Allocation Board because of the war (AEC X CRL-5; APP. X JSV-2(b), at pp. 27, 34).

In 1944, AEC purchased the properties of the Alabama Water Service Company (Alabama Water) which owned two small hydroelectric plants and two small diesel generators, linked together with 44 kv transmission lines. At the time of the sale, Alabama Water purchased part of its bulk power supply from Applicant under a contractual agreement because Alabama Water did not generate sufficient power to meet its load. This agreement was voluntarily continued in effect by Applicant without substantial change when AEC acquired Alabama Water's properties. Applicant did not oppose AEC's acquisition of these properties from Alabama Water (Lowman, Direct, pp. 15-17; APP. X JMF-A, (Farley) pp. 214-216, 251-256; APP. X JSV-21; Tr. 9,332-9,341). In 1945, approximately one year after this contract was voluntarily continued in effect with AEC, Applicant furnished approximately 30 percent of AEC's power requirements (APP. X 304, p. 8; AEC X 3, (Lowman) pp. 15-18; APP. X JMF-A, (Farley) pp. 213-216).

In late 1946, AEC sought approval from REA to borrow $5.516 million to construct a 23 mw steam generating plant at Gantt, Alabama, and to engage in various construction projects, including new transmission lines. [233] Under the Rural Electrification Act of 1936, 7 U.S.C. 901 *et seq.*, REA loans may not be used for the purpose of constructing electric facilities to serve towns having a population of 1,500 or more, or to furnish electric power to persons who already receive central station service.[234] When AEC made application to the Alabama Director of Finance for approval to issue a note of indebtedness to REA, Applicant intervened and opposed the application on the grounds that the proposed project was to be used to serve customers already being served by Applicant, and represented a duplication of service in violation of Sections 904 and 913 of the Rural Electrification Act (APP. X JSV-34; Tr. 9,386-9,389). A

[233] After AEC filed its application for a loan from REA, Applicant offered AEC a reduction in the rates charged for electric power. One purpose of the offer was to dissuade AEC from proceeding with its plans to construct the new generating facilities (AEC X CRL-6, AEC-62; Tr. 23,207-23,223). This was not the only purpose, however (*see* p. 909, *infra*; APP. X JMF-49).

[234] Section 904 of the Act reads in pertinent part: "The Administrator is authorized and empowered . . . to make loans for rural electrification to persons, corporations, States, territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperatives, nonprofit or limited-dividend associations . . . for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service . . . ." 7 U.S.C. 904. Section 913 of the Act provides in pertinent part: "As used in this chapter, the term 'rural area' shall be deemed to mean any area of the United States not included within the boundaries of any city, village or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof . . . ." 7 U.S.C. 913.

hearing was held after which the Director of Finance's designated representative, the Chief of the Division of Local Finance, who heard the evidence, issued an order denying AEC's application (APP. X 161). The Director of Finance then reversed this decision and entered an order authorizing AEC to issue the note to REA. Applicant promptly filed a petition in the Circuit Court for Montgomery County, Alabama, seeking to have the Order of the Director of Finance set aside and to have the earlier order denying AEC's right to issue the note reinstated. The Circuit Court granted Applicant's petition on the ground that, since the Director had not heard the evidence he was incompetent to set aside the Order of his designated representative. AEC appealed this Circuit Court decision to the Alabama Supreme Court, which affirmed the ruling of the Circuit Court (APP. X JSV-34; *Alabama Electric Cooperative* v. *Alabama Power Company*, 36 So. 2d 523 (Ala. 1948); *Alabama Power Company* v. *Alabama Electric Cooperative*, 36 So. 2d 530 (Ala. 1947). AEC was unable to proceed with its planned construction.[235]

Later, in 1948, AEC filed another application with the Director of Finance seeking approval to issue a note to REA for $1.952 million to improve AEC's existing hydroelectric and diesel generating facilities, and to construct new transmission lines and substations. Applicant did not oppose this application and the loan was ultimately consummated (APP. X JSV-34).

Prior to the filing of this application, however, AEC had planned to seek approval of the Director of Finance to proceed with its 1946 construction program, exclusive of the new 23 mw steam plant. The revised program included construction of new transmission lines in areas served by Applicant in Alabama and by Gulf Power in Florida. Applicant expressed opposition to this revised construction program because it would have duplicated facilities of Applicant and Gulf Power and so advised AEC. AEC did not seek approval of this particular program (APP. X JSV-34).

Two years later, in May 1950, AEC obtained an REA loan of $3.2 million to construct a new 15 mw steam plant (consisting of two 7.5 mw units) at Gantt, Alabama. AEC filed a petition with the Alabama Director of Finance seeking approval for the issuance of a note to REA evidencing the loan. AEC claimed that Applicant's electric service was inadequate and that Applicant did not have sufficient facilities to provide AEC with a dependable power supply, although at the time Applicant was planning to construct a new generating plant and transmission lines to strengthen its electric system in southeast Alabama.[236]

---

[235] AEC proposed to serve customers receiving central station service from Applicant in Antauga, Montgomery, Geneva, Bulloch, Barbour, Butler, Coneuch, Escambea, Houston, and Henry Counties, Alabama (Tr. 9,388-9,389).

[236] AEC opposed Applicant's proposed construction on the ground that the planned transmission lines would be used to compete with AEC for new service in areas then served by AEC (APP. X JMF-A, (Farley) 235-236; Tr. 20,975-20,983; Tr 9,407-9,408).

Applicant opposed AEC's petition before the Director of Finance, arguing that it would result in an unnecessary and wasteful duplication of facilities contrary to the public interest. On August 7, 1951, the Director of Finance approved the AEC's issuance of a note for the proposed loan. Applicant took no further action with respect to this determination. AEC placed its new steam plant at Gantt in operation in 1955 (Lowman, Direct, pp. 30-31; DJ 4,141b; APP. X JSV-37a).

The Board finds that Applicant lawfully opposed AEC's proposals to construct a new steam generator and new transmission lines in the period of the 1940's, on the grounds that it involved unnecessary and wasteful duplication of Applicant's facilities, contrary to the express purpose of the Rural Electrification Act, and the public interest. The Board perceives nothing inconsistent with the antitrust laws in Applicant's conduct here.

2. The Early 1960's

On April 3, 1961, AEC filed an application[237] with REA for a loan of approximately $25.2 million to construct a new 66 mw steam generating plant on the Tombigbee River near Jackson, Alabama, and several hundred miles of new transmission lines. The proposal also called for a second 66 mw steam unit to be constructed at Jackson, but the cost of this unit was not proposed to be funded by the requested loan (AEC X 3, (Lowman) p. 643; AEC X CRL-50; DJ 4,156; APP. X 148).

In late October of that year, REA authorized a loan of approximately $20.3 million to AEC to construct a new 66 mw steam unit near Jackson and for 710 miles of transmission lines and associated substations in southern Alabama and northwestern Florida. This loan became known as the "H-Loan," and was conditioned by REA on AEC's obtaining from its member cooperative customers new thirty-five year all-requirements power supply contracts, in order to assure that AEC would have a market for the power generated and transmitted by the REA financed facilities and, therefore, be able to repay the loan (AEC X CRL-50, pp. 225-227).

In February 1962, AEC filed an application with the Alabama Director of Finance seeking approval for the issuance of evidences of indebtedness to REA for the loan. Applicant intervened in the application proceedings and opposed approval on the ground that the proposed construction would duplicate Applicant's facilities as well as Gulf Power's. Applicant also questioned the engineering feasibility of the proposed project (AEC X 3, (Lowman) p. 64; DJ 4,006; APP. X 146, X 149).

Hearings on AEC's application commenced in March 1962 and ended in

[237] This application was originally initiated by AEC in late 1959 and had to be revised.

October 1962. On January 9, 1963, the Director of Finance approved AEC's application. On the same date, Applicant filed three law suits in the Circuit Court for Montgomery County, Alabama. The first law suit sought a writ of certiorari for review of the proceedings before the Director of Finance; the second suit sought a declaratory judgment that the order of the Director granting AEC's application was null and void; and the third action requested a temporary injunction restraining AEC from consummating the loan pending completion of judicial review of the proceedings before the Director of Finance.

The Circuit Court granted certiorari, along with a temporary restraining order. On July 9, 1963, the Circuit Court issued an order quashing and declaring void the Director's January 9, 1963, order approving AEC's application (AEC X 3, (Lowman) pp. 70-71).

AEC then appealed this decision to the Alabama Supreme Court. On September 10, 1964, the Alabama Supreme Court issued its opinion reversing the order of the Circuit Court and affirming the decision of the Director of Finance. Applicant then filed an application with the Supreme Court for rehearing, which was denied on April 9, 1965.[238] Applicant then filed a second application for rehearing. Applicant's suit for declaratory judgment was dismissed on April 14, 1965, and the temporary restraining order was dissolved on May 3, 1965. Applicant, however, obtained a reinstatement of the restraining order four days later, but it was later terminated when the Alabama Supreme Court denied Applicant's second application for rehearing[239] (AEC X 3, (Lowman) pp. 64-72, AEC X CRL-47, 48-49).

The day after the Alabama Supreme Court denied Applicant's first application for rehearing, Applicant filed suit in the United States District Court for the Middle District of Alabama, Northern District, against AEC, REA, the Administrator of REA, the United States Department of Agriculture, and the Secretary of Agriculture, seeking an order enjoining all defendants from consummating the H-Loan. As grounds, Applicant alleged that the H-Loan violated the Rural Electrification Act, that the H-Loan constituted a conspiracy to violate the Act, and that the thirty-five year all-requirements contracts imposed by REA as a condition of the H-Loan constituted a violation of the Federal antitrust laws (AEC X 3, (Lowman) p. 72-74; AEC X CRL-50; AEC X CRL-51; APP. X JMF-A, (Farley) pp. 289-290; APP. X JMF-38). AEC filed a motion with the Federal District Court to dismiss Applicant's suit. The other defendants filed similar motions, and also sought summary judgment on the ground that Applicant lacked standing to bring the action.

In July 1965, the United States District Court denied Applicant's motion for a preliminary injunction and granted the motion to dismiss Applicant's suit.

[238] *Alabama Electric Cooperative* v. *Alabama Power Company*, 176 So. 2d 483 (Ala. 1965).

[239] *Alabama Power Company* v. *Alabama Electric Cooperative*, 176 So. 2d 487 (1965).

The court held that Applicant lacked standing to maintain the action, and that the thirty-five year all-requirements contracts were the result of valid government action, not a violation of the antitrust laws. *Alabama Power Company* v. *Alabama Electric Cooperative*, 249 F. Supp. 855 (M.D. Ala., 1965) (APP. X JMF-38). Applicant then appealed this decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the District Court's decision on April 2, 1968, with one Judge dissenting. *Alabama Power Company* v. *Alabama Electric Cooperative*, 294 F. 2d 672 (CA 5, 1968). In its opinion the Fifth Circuit not only held that Applicant lacked standing to maintain the law suit, but also that the REA was within the bounds of the Rural Electrification Act in requiring AEC to obtain the thirty-five year all-requirements contracts with its member cooperatives as security for the REA loan, 394 F.2d at 676-678. Applicant filed a petition for rehearing with the Court, which was denied on July 11, 1968, 397 F.2d 809. Applicant then unsuccessfully sought certiorari in the United States Supreme Court, *Alabama Power Company* v. *Alabama Electric Cooperative*, 393 U.S. 1000 (1968).

The delay resulting from this extensive litigation substantially increased the cost of construction of AEC's project (DJ 4,156; AEC X 3, (Lowman) pp. 79-80). In the end, AEC altered its plan to specify one 75 mw steam plant at Jackson rather than the two 66 mw units originally proposed. The 75 mw plant did not begin service until 1969, some eight years after AEC filed its revised application for the H-Loan, and four years after the originally proposed first 66 mw steam unit was scheduled to begin operation (DJ 4,156; APP. X 149).

During the time the H-Loan was in litigation, AEC itself initiated several legal and administrative proceedings against Applicant. In 1964, AEC filed a complaint before the FPC in Docket E-7183 to prevent the cities of Troy and Luverne from obtaining their power supply from Applicant and to obtain a reduction in Applicant's wholesale rate. In 1966, AEC sought an injunction against the City of Opp and the city's Utility Board and Applicant to prevent the city from negotiating with Applicant for wholesale power. AEC also intervened in proceedings before the Alabama Public Service Commission in which Applicant sought a certificate of convenience and necessity to commence service to Troy and Luverne. In addition, AEC sought to prevent the City of Evergreen from obtaining its power supply from Applicant. Furthermore, AEC participated in a number of other legal and administrative proceedings before the Alabama Courts, the Alabama Public Service Commission and the Securities and Exchange Commission seeking to prevent Applicant from constructing certain electric facilities and otherwise contesting various plans of Applicant (APP. X JSV-A, (Vogtle) pp. 62-66; APP. X JMF-A, (Farley) pp. 275, 279-281, 295-296, 302-303).

Applicant's efforts to challenge AEC's proposed construction of new generation in the 1960's, particularly the projects associated with the H-Loan, did have

the effect of delaying AEC's installation of new generation. The Board finds, however, that these efforts do not constitute anticompetitive conduct inconsistent with the antitrust laws. The issues Applicant raised were reasonably open to dispute. The forums in which Applicant raised the issues, and the means of raising them, were appropriate in the circumstances.[240]

B. Applicant's Maintenance of Low Wholesale Rates to Discourage Competitors from Developing and Installing Their Own Generation

The Department and the other parties supporting its contentions also charge that Applicant, in the period 1941-1947, either lowered or offered to lower, its wholesale rates for firm electric power in order to make self-generation by its wholesale customers uneconomically unattractive. The Department and these parties point out that over the years, Applicant has developed substantial economies of scale and secured the benefits of coordination, and therefore, had the leeway to lower its wholesale rates. In each case, the Department and the others state that Applicant reduced its wholesale rates without any legal obligation to do so, and such rate reductions were not justified on the basis of a cost of service study. All of the parties assert that Applicant's rate reductions were for the clear purpose of maintaining the monopoly power over generation in central and northern Alabama.

1. The 1941 Rate Reduction

The first case of rate reduction by Applicant, allegedly for the purpose of discouraging competing self-generation, occurred in 1941. The Department and AEC offer testimony that when Applicant learned certain distribution cooperatives in southern Alabama were forming AEC and were making application to REA for a loan to construct new generation and transmission facilities, Applicant reduced its wholesale firm power rates from 11.3 mills/KWH to 9.4 mills/KWH (AEC X 3, (Lowman) p. 13; Tr. 9,323). As we noted earlier, AEC was incorporated on June 24, 1941 (APP. X 145).

The record shows that on May 29, 1941, Applicant filed a revised wholesale rate, called Rate "R," with the Alabama Public Service Commission. This rate filing proposed a reduction in wholesale rates to certain municipally owned electric distribution systems, to certain privately owned electric utilities, and to certain rural electric distribution cooperatives (APP. X JSV-2c).

Applicant represented that the new rate was intended to reduce the number

[240] The contention that Applicant's use of litigation in this instance constituted a "sham" is considered later in this Decision. See pp. 940-942, *infra*.

of special power contracts entered into by Applicant and the aforementioned wholesale customers, which contracts were required to be filed with, and approved by the Alabama Public Service Commission. In its rate filing, Applicant requested the Alabama Commission to approve Rate "R" by June 3, 1941, in order to permit Applicant to reflect the new rate in its billing to wholesale customers for the month of May 1941 (APP. X JSV-A, pp. 8-9; APP. X JSV-2c).

The Department and AEC claims that Rate "R" resulted in a reduction of approximately 6.7% in Applicant's revenues. The Department and AEC say it is significant that this reduction in revenues occurred at a time when Applicant was completing its withdrawal of service from the northern counties in Alabama[241] and was asking for a voluntary curtailment in electric power consumption because of World War II (APP. X BJC-A, (Crawford) p. 191; APP. X JMF-A, (Farley) pp. 201-208; APP. X JSV-2c). In light of these facts, the Department and AEC conclude Applicant had no increase in sales to offset the loss of revenue from the lower rate, and that Applicant's rate reduction was anticompetitive.

The Board finds that Applicant's Rate "R" was filed with the Alabama Commission almost one month prior to the formation of AEC, and was requested to be effective less than one week later. We further find that the purpose of this rate filing was not to forestall self-generation by AEC, but legitimately to reduce the number of special power contracts entered into by the Applicant and certain of its wholesale customers. Such contracts were required to be submitted to and approved by the Alabama Commission. The rate filing served a legitimate end. We find that the anticompetitive charges with respect to the purpose of this rate reduction are based on speculation and are not supported by the record. There is simply no evidence of any connection between Applicant's rate reduction and the formation of AEC. Indeed, the rate reduction was filed and made effective in advance of that event. The Board can find no anticompetitive conduct on the part of Applicant with respect to this particular rate reduction.

2. The 1946 Rate Reduction

The Department and AEC also assail a rate reduction offered AEC by Applicant in 1946. In September 1946, AEC made application for a loan from REA

[241] In 1934, Applicant agreed to sell its electric properties in northern Alabama to TVA, after the creation of TVA in 1933 and the consequent duplication of distribution facilities by municipalities with loans granted them by the Public Works Administration. In 1940, Applicant surrendered and transferred its franchises to provide electric service in various northern Alabama cities and towns to rural electric cooperatives, municipalities and TVA (APP. X JMF-A, pp. 140-144, 199-206). This action completed Applicant's withdrawal of service from northern Alabama.

to construct a new 23 mw steam plant at Gantt, Alabama, and associated transmission lines. In October 1946, Applicant contacted REA about AEC's loan application, and indicated a desire to continue selling wholesale power to AEC rather than AEC generating its own power (DJ X 4,146). Applicant felt that AEC's proposal was an unnecessary and wasteful duplication of existing facilities. Applicant was advised by REA that the "door was still open" to offer an arrangement for the purchase of wholesale power by AEC instead of construction of new generation (DJ X 4,146). Applicant also learned from REA that AEC had represented in its loan application to REA that generation was more economical than purchased power, that continuity of electric service was better assured if power was self-generated, and that Applicant's ability to furnish AEC's future power needs was questionable (DJ X 4,146). Consistent with the Rural Electrification Act of 1936 and its underlying policy, REA encouraged Applicant to offer a lower wholesale rate to AEC (APP. X JMF-49).

Thereafter, in December 1946, Applicant offered AEC a new lower wholesale rate. REA approved AEC's loan application in the summer of 1947.[242] Nonetheless, in October 1947, Applicant and AEC entered into a three-year contract which specified this new lower rate (APP. X JSV-34).

The record shows that the purpose of this rate reduction was twofold: (1) to allow Applicant to continue selling wholesale power to AEC and (2) to dissuade AEC from proceeding with its plans to construct the new 23 mw steam plant and associated transmission which Applicant considered uneconomical and a wasteful duplication of its existing facilities (AEC X CRL-63; DJ 4,303).

The Board finds that while Applicant did manifest an intent to keep AEC from installing its own generation at Gantt under the 1946 proposal, Applicant was properly concerned with avoiding uneconomic and wasteful duplication of its facilities. It is significant that REA did approve AEC's loan application. The proposed 23 mw steam plant at Gantt, however, was later denied by Alabama's Department of Finance and the courts because it served no public need (APP. X 161; *Alabama Electric Cooperative* v. *Alabama Public Service Commission*, 36 So. 2d, 523 (Ala. 1948); *Alabama Public Service Commission* v. *Alabama Electric Cooperative* 36 So. 2d, 530 (Ala. 1947)). Accordingly, we find that Applicant's offer of lower wholesale rates to AEC, at this time, was made in good faith with the encouragement of REA. We are not persuaded in light of the

[242] At this time, Applicant was aware that AEC's electric system had deficiencies which affected its reliability. AEC requested Applicant to interconnect with AEC at Clio, Alabama, but Applicant indicated such an interconnection would not substantially improve AEC's reliability. After some delay, Applicant did interconnect at Clio (APP. X JSV-A, (Vogtle) pp. 26-30; APP. X JSV-21, 22, 23, 24, 25 and 26). The Board finds no anticompetitive motive on the part of Applicant in regard to the circumstances surrounding the interconnection.

evidence regarding this rate reduction, that Applicant acted with anticompetitive intent or motive.

3. 1950 Rate Reduction

Applicant made another offer of a rate reduction to AEC in April 1950, after AEC had applied to REA for the release of the 1947 approved loan, this time for the construction of a new 15 mw steam plant at Gantt, Alabama. The proposal was scaled down from AEC's earlier proposed 23 mw steam plant at the same location (App. X JSV-32; AEC 3, (Lowman) pp. 28-29; AEC X CRL-14; AEC X CRL-15).

This rate reduction contemplated discontinuance of Applicant's limited interconnection with AEC near Samson, Alabama, and the establishment of a new delivery point with AEC near Gantt. The proposed arrangement would result in an overall rate reduction of 11.53% to AEC, and would have improved the reliability of AEC electric system (AEC X 14, APP. X JSV-A, pp. 32-35).

The offer for this rate reduction also included a territorial protection agreement, which would have established boundary lines between Applicant and AEC's service areas. This protection agreement, however, would have permitted each party to continue serving customers in the other's service areas under existing contractual agreements (AEC X CRL-14, AEC X CRL-15). Applicant included this territorial protection agreement at the suggestion of AEC (AEC CRL-14).

The offer of the rate reduction was revised by Applicant in June 1950 to include a discount for substation ownership. The rate was approved by the Alabama Public Service Commission in November 1950. It was made retroactive to April 1, 1950, at the request of AEC (APP. X JSV-14). In May 1950, AEC received REA approval of its loan, some eight months prior to the date when the Applicant's rate reduction actually went into effect. REA released the funds to AEC under the loan in October 1950 (APP X JSV-14, AEC 3, (Lowman) p. 30).

The Board is not satisfied that Applicant's offer of a rate reduction in 1950 represented anticompetitive conduct with the clear purpose of maintaining a monopoly in self-generation. This particular rate reduction had the distinct purpose of improving the reliability of AEC's electric system, and went into effect even though AEC had obtained the REA loan for construction of self-generating facilities. Moreover, Applicant made the rate reduction retroactive for a period of eight months prior to the November 1950 effective date of the rate. Significantly, the offer included a territorial protection agreement not desired by Applicant, but by AEC. It appears to us that Applicant was attempting to accommodate AEC while, at the same time, offering a means to improve AEC's electric system reliability. We cannot find, in light of these facts, that Applicant

was acting inconsistently with the antitrust laws and the policies underlying these laws in connection with this rate reduction.

4. "Coosa Rate"

The Department, AEC, MEUA and the Staff assert that Applicant placed into effect in 1958 its "Coosa rate," retroactive to 1954, in order to preclude Federal development of hydroelectric projects on the Coosa River in Alabama which would have provided electric power for preference customers under the Flood Control Act of 1944. Under the Rivers and Harbors Act of 1945, 33 U.S.C. 603(a), Congress had reserved development of the Coosa River to the Federal government (St. John, Direct, pp. 25-27; AEC X 3, (Lowman) pp. 43-49). Applicant's opponents in this proceeding claim that the "Coosa rate" had the result of foreclosing the development of an alternative source of power in central and southern Alabama, and that it was, therefore, anticompetitive.

The facts and circumstances surrounding the "Coosa rate" are clear. The record shows that in 1953, Applicant made application to the Federal Power Commission for a permit to construct five hydroelectric plants on the Coosa River. At this time, Applicant determined a need to expand its electric system. The FPC concluded that the stretch of the Coosa River where Applicant proposed the hydroelectric plants had been preempted for development by the Federal government under the aforementioned Rivers and Harbors Act of 1945, and that before the FPC would have jurisdiction over Applicant's proposed hydroelectric development, Congress would have to adopt legislation authorizing the FPC to license such development. There were no plans by the Federal government to develop the Coosa River (APP. X JMF-A, (Farley) pp. 236-237).

In 1954, Congress did adopt legislation[243] giving the FPC jurisdiction over the hydroelectric development of the Coosa River. The legislation required the completion of Applicant's proposed hydroelectric development ten years from the date of commencement of construction of the first dam. The FPC issued a license to Applicant for construction and operation of four dams and hydroelectric plants in September 1957 (APP. X JMF-A, (Farley) pp. 236-237).

However, while the legislation was pending before Congress, Governor Gordon Persons of Alabama[244] interposed an objection before the United States Senate to the proposed law, which prevented its passage (Tr. 19,227;

---

[243] Public Law 83-436, 68 Stat. 302.

[244] Governor Persons had served as President of the Alabama Public Service Commission and as State REA Administrator prior to being elected as Governor. In addition, he had been a consulting engineer prior to holding these positions, and had represented rural cooperatives in that capacity. The record shows that Governor Persons had close and substantial ties to AEC and rural cooperatives (APP. X JSV-A (Vogtle) p. 42; APP. X JSV-2b; APP. X JSV-37a; Tr. 20,521 and 20,524).

20,524; 20,535-20,539). Governor Persons demanded that Applicant reduce its wholesale rate to Alabama cooperatives in return for withdrawing his opposition to the new legislation (Tr. 14,227; 20,524; 20,535-20,539). In order to satisfy Governor Persons' objections, Applicant, in 1954, agreed to reduce its wholesale rates upon the passage of the legislation and approval of a license by the FPC for hydroelectric plants (DJ X 211). Although Applicant's municipal customers did not oppose the legislation and were not included in Governor Persons demands, Applicant offered the same reduced rate to them, inasmuch as they were in the same class of customers as the cooperatives (Tr. 21,022; Tr. 4,189; Tr. 4,176; 4,194). Upon AEC's request, Applicant also applied the rate reduction to the deficiency power rate it had then in effect with AEC (AEC X CRL-27). Applicant received its final hydroelectric licenses in 1958, but the rate reduction was made retroactive to 1954 in compliance with Applicant's agreement with Governor Persons.

The Board finds no evidence that Applicant's "Coosa rate" was anticompetitive, or had the effect of foreclosing the development of an alternative source of power, as contended by the Department, AEC and MEUA. Indeed, there is no evidence of record to establish that the Federal government ever seriously considered development of the Coosa River, or that Congress ever appropriated funds for this purpose. It is clear that Applicant's "Coosa rate" was an accommodation to remove political opposition to legislation granting the FPC jurisdiction to issue licenses for hydroelectric development along the Coosa River. This opposition came from Governor Persons of Alabama, who had a long history of favoring the cooperatives as against Applicant. If anything, Applicant was effectively coerced into offering a lower wholesale rate.

C. Applicant's Refusal to Coordinate With AEC

The Department and AEC, as well as the other parties supporting them allege Applicant refused to coordinate with AEC in the mid 1950's. The parties also state that Applicant, in the period 1967-1972, refused to offer AEC fair coordination. Applicant's conduct in these instances is characterized as refusals to deal with AEC, and therefore, inconsistent with the antitrust laws.

1. Refusal to Coordinate in the Mid 1950's

In January 1955, after AEC had completed installation of its two 7.5 mw steam generating units at Gantt, Alabama, AEC requested Applicant to provide it with the cost for maintenance and emergency power, and the additional demand charge in the event one of the units was taken out of service for routine

inspection and maintenance[245] (AEC X 3, (Lowman) pp. 33-43; AEC X CRL-19; AEC X CRL-21; AEC X CRL-23). Applicant responded to AEC's request approximately one week after receiving it. In its response, Applicant included a detailed tabulation which showed that the rate for additional power and energy to AEC, in the event that one of the steam units was taken out of service for routine maintenance, was slightly lower than the average rate for purchased power with both steam units in operation. Applicant estimated the total cost of such service to be $25,918[246] (AEC X CRL-20; Tabulation 4). The additional rate was based on the assumption that AEC's steam unit would be taken out of service during January which was the off-peak period. The record does not show whether AEC accepted or rejected Applicant's response. We find no refusal on the part of Applicant to coordinate with AEC in this instance.

In March 1955, AEC met with Applicant to discuss the terms and conditions of the proposed power supply contract which Applicant had submitted to AEC in December 1954. During this meeting, AEC requested Applicant to submit a rate at which it would furnish emergency or standby power and energy when one of the steam units at Gantt was forced out of service (AEC X CRL-23). Applicant indicated it was not in a position at that time to submit a rate to AEC for such emergency or standby service when it became necessary (AEC X CRL-23). The power supply contract between the parties was executed apparently at the meeting. Sometime later, it was submitted to REA for approval (AEC X CRL-22). The contract contains no provisions for emergency or standby service to AEC in the event one of the steam units was forced out of service (AEC X CRL-22). When REA approved the contract in June 1955, it estimated the cost of emergency and maintenance power from Applicant to AEC to be $44,000, which was about $15,000 higher than the estimate given AEC in January 1955. REA recommended that AEC make further efforts to obtain emergency or standby arrangements in order to achieve greater savings. REA's estimate was based on the assumption that the "ratchet" clause in the power supply contract would operate for eleven full months after the additional

[245] The request was made in connection with a proposed power contract between Applicant and AEC which Applicant submitted to AEC on December 20, 1954 (AEC X CRL-19).

[246] This estimate was based on the rate schedule contained in a proposed power supply contract Applicant submitted to AEC in December 1954. The contract contained a 75% "ratchet" clause which operated to increase AEC's power supply costs for the next four months following the month in which an additional demand for power was placed on Applicant by AEC. A "ratchet" clause is generally defined as a clause which provides that the maximum past or present demands be taken into account to establish billings for previous or subsequent periods (APP. X JMF-46, (FPC Opinion No. 533, p. 969, fn3)). Significantly, AEC did not complain about the ratchet clause in its power supply contracts with Applicant until AEC lodged a complaint against Applicant with the FPC in connection with Applicant's wholesale rates. The complaint led to FPC Docket E-7183 (Tr. 8,771).

demand for power and energy was placed on Applicant by AEC, whereas Applicant's estimate was grounded on the ratchet clause operating only four months (APP. X BJC-A, (Crawford) pp. 225-228).

In December 1956, a tube in one of the boilers ruptured, causing shutdown of one of AEC's steam units at Gantt. As a result, AEC placed an additional demand for power and energy on Applicant. Under the power supply contract between Applicant and AEC, the ratchet provision became operative. Accordingly, AEC requested Applicant to take into consideration the emergency nature of the breakdown in Applicant's billing to AEC for December 1956, so as to relax the operation of the ratchet and reduce the cost of power which AEC was required to pay Applicant. AEC also indicated to Applicant that replacement of the tube in the boiler was scheduled for April 1957, and asked to discuss the cost of additional energy it required during such maintenance (AEC X CRL-24). Four days after being notified of AEC's emergency, Applicant responded by indicating that the breakdown was considered to be one of normal liability in the operation of a power plant, and did not warrant a relaxation of the ratchet clause in the power supply contract between the Applicant and AEC. Although Applicant refused to adjust its December 1956 billing to AEC, Applicant did indicate a willingness to discuss a special rate for additional energy and demand during AEC's maintenance of the steam unit in April 1957. In this regard, Applicant requested AEC to furnish certain information (AEC X CRL-25).

The record does not clearly indicate whether such discussions were held, or how the matter of a special rate for emergency service during maintenance of the steam unit at Gantt in April 1957 was resolved. Applicant says the parties agreed to apply the ratchet[247] rather than have Applicant design a special rate (Tr. 20,593-20,594).

The Board finds no evidence that Applicant refused to coordinate with AEC, let alone refused to deal with AEC in providing emergency maintenance service in the mid 1950's. The record discloses that AEC's initial request for a special rate related to additional power and energy in circumstances of routine maintenance of AEC's equipment, rather than emergencies such as a boiler breakdown (AEC X CRL-19). Further, there is no evidence that Applicant was unwilling to negotiate a special rate with AEC for emergency and maintenance services during periods of routine inspection of equipment. On the contrary, the record shows that Applicant was quite willing to do so (AEC X CRL-19-25).

[247] Applicant's President, Joseph M. Farley, testified that it was his understanding that the parties ultimately decided to apply the ratchet rather than agree upon a special rate for emergency service. Mr. Farley, however, could not recall the basis of his understanding (Tr. 20,593-20,594). The Board has evaluated Mr. Farley's testimony on the point, and finds no reason for rejecting it. On the overall, Mr. Farley was candid and straightforward with the Board. We find all of his testimony to be credible.

Although Applicant certainly could have chosen to relax the application of the ratchet clause in its power contract with AEC during the December 1956 emergency, we are not prepared to find that its refusal to do so constitutes an anticompetitive effort to injure AEC.

2. Applicant's Refusal to Offer AEC Fair Coordination in the Period 1967 to 1972

The Department and AEC strenuously argue that Applicant refused to offer AEC fair coordination between 1967 and 1972. Applicant's refusal is claimed to be anticompetitive.

In January 1967, AEC sought to obtain additional loan funds from REA to complete construction approved under AEC's H-Loan application. REA advised AEC to negotiate with Applicant for an alternate supply of power, as required by REA Bulletin 111-3, before making application for additional funds. REA's representatives indicated that they would consider recommending a new large loan for AEC, including funds for a new generating unit at Jackson, Alabama, (in addition to the unit approved under the H-Loan) and additional transmission facilities, if it were not possible to enter into a fair interconnection agreement with Applicant. REA's representatives emphasized, however, the preferability from REA's standpoint of an interconnection arrangement with Applicant, which would obviate or postpone some transmission facilities, and which would allow for staggering of construction with Applicant (APP. X 44). It was in this context that negotiations between Applicant and AEC commenced looking toward an interconnection and coordination agreement. The record shows that such an agreement, between AEC and Applicant, albeit in a limited form, was not finally consummated until 1972 (DJ 3,013).

While the H-Loan litigation was pending before the Courts, Applicant replaced AEC as the wholesale power supplier to the cities of Troy and Luverne, Alabama.[248] In addition, the City of Opp was considering purchasing its power supply at wholesale from Applicant (AEC X 3, (Lowman) pp. 26-28, 81-82; APP. X BJC-A, (Crawford) p. 159). In early 1967, Choctawhatchee Electric Cooperative (CHELCO), located in northwest Florida, and a member of AEC, sought to purchase its power from Gulf Power and avoid its 35-year all-requirements contract with AEC (AEC X3, (Lowman) p. 92). AEC was clearly facing competitive threats.

On April 11, 1967, AEC met with Applicant at the suggestion of REA to

[248] In 1964, the city of Luverne filed a lawsuit against AEC to determine the cancellability of its power supply contract with AEC. Applicant paid the city $10,000 as "reimbursement" of expenses incurred in connection with such litigation (Tr. 22,169-22,272). This payment is highly questionable, but we need not make a special finding as to its legitimacy.

resolve the attempt of CHELCO to avoid purchasing its power from AEC under a 35-year all power requirements contract with AEC, which had been obtained as security for the H-Loan. As indicated above, CHELCO desired to purchase its wholesale power from Gulf Power. But REA was not willing to approve CHELCO's purchase of power from Gulf Power until an appropriate disposition was made of certain generating and transmission facilities (owned by CHELCO and operated by AEC) which had been constructed with REA loan funds, and which would become useless if Gulf Power became CHELCO's supplier (Tr. 8,838; 19,405-19,406; 19,409-19,412). Under the CHELCO proposal, Applicant would acquire certain of the transmission lines. The disposition of the generating and transmission facilities required the consent of AEC, which it was not willing to give without being compensated for the loss of CHELCO's load.

At the meeting, AEC was represented by its then President, Mr. J. Utsey; its then manager, Mr. Basil Thompson; its Staff Attorney, Mr. L. A. Beers; its Washington attorneys, including Mr. Joseph Swidler, former Chairman of the FPC; and an engineering consultant. Applicant was represented by Mr. Joseph Farley, then Executive Vice President of Applicant, and Applicant's legal counsel. Mr. Swidler suggested that Applicant and AEC enter into a broad arrangement to resolve mutual problems before addressing the solution to the CHELCO question. Mr. Swidler suggested the solution should include an arrangement for the stability of customers and territory; more effective use of facilities involving interconnections, capacity exchanges, staggering of construction and other power pooling matters; and the price which AEC should receive for its loss of the CHELCO load (APP. X JMF-A, (Farley) pp. 344-346; AEC X CRL-72). Mr. Swidler also expressed AEC's concern for its wholesale business and AEC's intention to serve all of the power requirements of nine of its member cooperatives which Applicant was then serving (APP. X JMF-A, (Farley) pp. 346-349). Mr. Swidler proposed that, in consideration of AEC's loss of CHELCO, Applicant should agree not to provide any of the power requirements of these nine cooperatives. In return, AEC would agree not to serve certain other member cooperatives which Applicant was also then serving. Mr. Swidler also proposed that AEC would discuss ground rules on service to industrial loads in the areas where the cooperatives involved were located (APP. X JMF-A, (Farley) pp. 346-349). At this meeting, no agreement on any of these matters was reached between Applicant and AEC (APP. X JMF-A, (Farley) pp. 349-351).

On May 4, 1967, Mr. Farley wrote to Mr. Swidler pointing out that the proposed solution advanced by Mr. Swidler at the April 11 meeting was not economically justifiable as Applicant would be giving up more load to AEC than AEC was losing to Gulf Power. Mr. Farley did indicate that the Applicant, with assistance from Southern Services, was investigating the possibility of interconnection and interchange of power between Applicant and AEC. While these studies were underway, Mr. Farley suggested that the parties proceed to resolve

the CHELCO matter (APP. X JMF-51). It seems clear from the record that Applicant was most desirous of settling the CHELCO matter before any sort of interconnection agreement was entered into with AEC.

On May 22, 1967, Mr. Swidler responded to Mr. Farley and made it clear that AEC should serve all the power requirements of its nine member cooperatives which Applicant was then serving, and that these cooperatives were committed to being served by AEC under the 35-year all-requirements contracts as part of the H-Loan. At this time, it will be recalled that Applicant was challenging the validity of the 35-year all-requirements contracts with its members in the Federal Courts.[249] Mr. Swidler also indicated the need to reach a tentative agreement on interconnection pending completion of Applicant's studies, as interconnection affected AEC's transmission planning (APP. X JMF-52).

On June 19, 1967, Mr. Farley responded to Mr. Swidler's May 22 letter. Mr. Farley emphasized that the basis for negotiations between Applicant and AEC did not include Applicant giving up its wholesale customers (the nine cooperatives) to AEC. Applicant plainly would not agree to give up any of its wholesale customers to AEC. Mr. Farley further indicated that Applicant was proceeding with its studies on interconnection, but that Applicant needed to know AEC's furture plans for transmission and generation expansion at the Jackson Plant since such information would have a significant effect on the kind of interconnection arrangements between Applicant and AEC (APP. X JMF-53).

On July 28, 1967, representatives of both Applicant and AEC met for further discussions on this matter. Speaking for AEC, Mr. Swidler reiterated AEC's positions originally set forth in the April 11 meeting, and indicated that AEC's Board of Directors had approved them as a basis for further negotiations with Applicant. At the meeting, Applicant's representatives rejected AEC's positions, especially the proposal that Applicant give up wholesale service to the nine AEC member cooperatives (APP. X JMF-A (Farley) pp. 358-360). At this same meeting, Applicant indicated that its initial studies on interconnection did not establish any mutual advantage to Applicant and AEC, and invited AEC to demonstrate any advantage on the subject of staggering of units. Mr. Swidler, on behalf of AEC, advised Applicant that discussions on staggering of units should be held in the context of a general stability (of territory and loads) agreement between Applicant and AEC. AEC also suggested some additional points for interconnection with Applicant, including interconnection at Millers Ferry Dam (a Federal hydroelectric project) then under construction (APP. X JMF-A, (Farley) pp. 366-373). Applicant did indicate that it might be willing to enter into an interconnection agreement with AEC involving the Jackson Steam Plant, but that this matter required further study (APP. X JMF-A, (Farley) pp. 373-374).

[249] *See* pp. 906-907, *supra*.

On August 10, 1967, AEC's President, Mr. Utsey, wrote REA's administrator outlining AEC's views on the several meetings held with Applicant to that date (AEC X CRL-72). The REA Administrator sent AEC's letter to Applicant for comment. Finally, on October 23, 1967, Mr. Farley wrote Mr.Swidler and indicated that Applicant's study of possible interconnection at Jackson showed that such an interconnection would likely serve as a point of flow of power into Applicant's electric system, which was not needed, rather than a delivery point for power to AEC. Accordingly, Mr. Farley stated that since an interconnection at Jackson would not benefit Applicant, Applicant would decline to do so. The Jackson Plant was scheduled for completion in 1968 and AEC badly needed an interconnection with Applicant there to enhance AEC's system reliability (AEC XCRL-73; Tr. 22,066-22,070; DJ 4,224).

Mr. Farley also made it clear that even if an interconnection at Jackson were advantageous to Applicant, Applicant would not interconnect if the net result would allow AEC to use Applicant's transmission system to sell power generated from the Jackson Plant to take over Applicant's wholesale customers. Applicant did not want its wholesale customer base to be eroded by reason of interconnection with AEC (AEC X CRL-73; DJ 4,224).

Shortly thereafter, in November 1967, the FPC issued its opinion in Docket E-7183,[250] a complaint proceeding initiated against Applicant by AEC in 1964 seeking a lower wholesale rate. AEC also challenged, among other things, the "ratchet" clause contained in its power supply contract with Applicant. In its decision, the FPC held against AEC. But the FPC also directed its staff, pursuant to then Section 202 of the Federal Power Act, to work with Applicant, AEC and SEPA, and where necessary, to make independent studies and recommendations to encourage development of coordination between the electric systems of Applicant and AEC in order to promote reliable electric service to the public at a minimum cost.[251]

AEC petitioned the FPC for review of its opinion in Docket E-7183, but this petition was denied on December 19, 1967. AEC then promptly advised Applicant that AEC would cooperate fully with the FPC staff, Applicant and SEPA in achieving coordination with Applicant (AEC X CRL-74).

During the following year, the FPC staff conferred with Applicant, SEC and SEPA, and conducted an investigation of the power supply situation in Alabama (APP. X JMF-A, (Farley) pp. 388-390). Applicant continued, however, to be concerned that any interconnection and coordination with AEC which would result from the voluntary studies would be used by AEC to take wholesale customers from Applicant (AEC X 47).

While the FPC's studies and investigations were underway, the Federal courts

[250] 38 FPC 963 (1967); *See also* APP. X JMF-46; APP. X BMG-2.
[251] 38 FPC at 976.

in 1968 ruled that the 35-year all-requirements power supply contracts, which AEC had obtained from its member distribution cooperative in connection with the H-Loan, were valid.[252] As a rsult of this determination, Applicant no longer had a legal basis to challenge the effect of these agreements on Applicant's wholesale business. The Board finds this Federal Court determination to be significant in analyzing the subsequent conduct of the parties in an antitrust context. After this decision, Applicant's asserted justification for refusing to interconnect and coordinate with AEC became anticompetitive.

After the FPC completed its investigation, the parties met on February 4, 1969, to discuss undertaking a joint study of AEC's system to achieve reliability. This meeting was attended by representatives of Applicant, AEC, SEPA, REA and AEC's consulting engineering firm, Stanley Consultants, as well as the FPC staff. At the meeting, Applicant expressed the view that such studies should be undertaken for the purpose of improving AEC's service to its existing customers, and not to assist AEC in taking wholesale customers from Applicant (AEC X 50A). Although Applicant expressed this specific reservation, Applicant did agree to participate in such studies (AEC X 50). Even though AEC's 35-year all-requirements power supply contracts with its members had been ruled legal, and that meant that AEC would have a basis to serve at wholesale certain of its members then served by Applicant, the company continued to reiterate its position that such joint studies should be conditioned upon a determination that AEC abandon its objective of taking over service to all distribution cooperatives in Alabama. Applicant also wanted the studies conditioned upon the recognition by the FPC that, in order to encourage the development of coordination between Applicant's and AEC's electric systems, the loads of AEC should be restricted to AEC's normal growth and not include loads diverted from Applicant (AEC X CRL-75). The record shows that Applicant clearly was not desirous of participating in any studies of AEC's system reliability if it would result in AEC taking over wholesale customers (distribution cooperatives) from Applicant. Applicant also reiterated its position that AEC's Jackson Steam Plant was uneconomic and unreliable, a position which Applicant had taken from the outset of AEC's H-Loan application. The record shows that Applicant had no desire to assist AEC in the expansion of AEC's electric system, by interconnection and coordination, if it would result in enabling AEC to take some of Applicant's wholesale customers (AEC X 75).

Nonetheless, Applicant did participate without delay in joint studies. The studies were completed in October 1969 (APP. X BMG-A, (Guthrie) pp. 15-17, Tr. 8,904). On November 7, 1969, the parties' engineers met to discuss the results of the studies. AEC proposed an interconnection near the Jackson Steam Plant.

---

[252] *See* pp. 906-907, *supra*.

Applicant preferred a connection in the vicinity of Abbeville, Alabama, to the Walter F. George Federal hydroelectric project because it was more advantageous. Applicant was most desirous of obtaining a purchase of unsold power from this project for use in Applicant's system.

Another meeting was held on January 8, 1970, at which AEC suggested for the first time (except for staggering of units) specific items which might be included in an interconnection agreement with Applicant (DJ 4,233; APP. X JMF-60). AEC wanted to enter into a form of a pooling agreement with Applicant, with the term to be mutually agreed upon and with an appropriate cancellation clause. In this regard, AEC favored a ten-year contract with a four-year cancellation notice. AEC also proposed an interconnection with Applicant at points to be identified and with facilities to be described. AEC suggested the purchase and sale of power and energy in the categories of (a) firm power with energy to be priced on a cost-plus basis; (b) emergency capacity; (c) economy power; and (d) maintenance power[253] (DJ 4,233; APP. X JMF-60). AEC also proposed pooling the reserve capacity of each party, with AEC purchasing from Applicant reserve capacity as required (DJ 4,233, APP. X JMF-60). Finally, AEC suggested joint planning for future generating and transmission facilities, and establishment of a joint administrative and operating committee (DJ 4,233; APP. X JMF-60). Applicant did agree to consider AEC's proposals, and indicated it would respond to them after study. The Board finds AEC's suggestions for coordination for inclusion in the interconnection agreement to be reasonable.

On February 2, 1970, the parties again met to discuss the possible interconnection agreement between Applicant and AEC. Applicant indicated at the outset of the discussions at that meeting, that preliminary to, and as a part of any interconnection agreement, Applicant would require protection against AEC taking Applicant's customers once AEC's electric system became more reliable by reason of interconnection with Applicant (DJ 4,237). Applicant indicated to AEC that it did not see how any real progress could be made in negotiations for an interconnection agreement until Applicant received assurance from AEC that it would not take Applicant's customers (DJ 4,237). Applicant also requested the following additional information from AEC before starting serious negotiations:

(a) load projects of AEC for periods of 5 to 10 years in the future:
(b) stability studies involving the generation at the Jackson Steam Plant and Walter F. George Dam. Applicant indicated a willingness to assist AEC in such studies, but only at AEC's expense;
(c) estimates of emergency requirements, including a determination of what would be considered emergency;

[253] AEC indicated that it did not contemplate having any excess power to sell Applicant in the foreseeable future, nor did it have any additional generation planned (DJ 4,233; Tr. 8,635-8,640).

(d) hydro information, including flow data for the critical year affecting capacity of AEC's hydroelectric units; also information on equipment and licensing of AEC's hydroelectric plants;
(e) capability of all of AEC's generating units;
(f) detailed information on AEC's operating practices;
(g) AEC's practices on provision of spinning reserves;
(h) automatic load shedding facilities; and
(i) information on operating practices during valley periods and on weekends (DJ 4,237).

Applicant also stated that AEC would be required to provide reserves equal to the capability of its largest unit, or 20 to 25% of the peak-hour demand on its system, whichever was the largest[254] (DJ 4,237). Applicant told AEC that Applicant was not interested in staggering generating units with AEC, but that Applicant was willing to supply AEC all of its power requirements. Applicant noted that it could supply these requirements cheaper than AEC could generate its own power (DJ 4,237).

On February 18, 1970, the parties again met to discuss the interconnection matter, including the proposed interconnection at the Walter F. George Dam. AEC had earlier taken the position that it was unwilling to enter into an interconnection at George in advance of interconnection at its Jackson Plant. Applicant distributed a proposed contract which was a revision of Applicant's March 1955 power supply contract with AEC. The proposed contract included various provisions, but none encompassing the suggestions for coordination made by AEC in the January 8 meeting (AEC X 54).

About one month later, on March 17, 1970, AEC furnished Applicant a draft interconnection agreement (AEC X 61, DJ 4,235). This proposed agreement contained numerous provisions encompassing the interconnection and coordination suggestions made earlier by AEC, but with more specificity (AEC X 61). Applicant continued to express the position that it needed assurance that AEC would not take Applicant's customers before agreeing to interconnect. Applicant was concerned about the effect of AEC's 35-year all-requirements contracts with its member distribution cooperatives on Applicant's wholesale business[255] (APP.X JMF-A, (Farley) pp. 404-408).

[254] In 1970, AEC's largest unit had a capability of 75 mw. AEC's peak-hour demand on its system approximated 130 mw (AEC X CRL-1). Under Applicant's suggested reserve formula, AEC would be required to maintain reserves of 75 mw (the size of its largest unit) or about 58% of its peak-hour demands (Tr. 21,610). This result is unreasonable on its face.

[255] During 1969, Mr. Farley and Mr. Wesley Jackson, AEC's recently named manager, met on several occasions, independent of the various meetings between Applicant and AEC. Mr. Farley and Mr. Jackson discussed security of their respective customers in these meetings. Their meetings served to highlight Applicant's intent not to lose wholesale customers to AEC through interconnection (APP. X JMF-A, (Farley) pp. 404-408).

Applicant then undertook a review of this proposed interconnection agreement. Applicant favored a revision of the draft agreement to eliminate many of the coordinating arrangements (AEC X 55; AEC X 61; Tr. 22,082-22,107).

In late April 1970, Applicant submitted a memorandum containing thirteen points which Applicant stated required agreement between Applicant and AEC (DJ 4,239). Although the thirteen points included Applicant's agreement to interconnect with AEC at Jackson, it also required AEC not to install new generation during the primary term (10 years) of the agreement, and required a cancellation or modification of AEC's 35-year contract with its members so that they would continue to be served by Applicant and not AEC (DJ 4,239).

On April 27, 1970, AEC bowed to pressure from SEPA, and finally agreed to an interconnection with Applicant at Walter F. George Dam, in advance of an interconnection with Applicant at Jackson. Applicant, of course, considered that agreement on this point was required before any agreement could be reached with AEC on interconnection and coordination, because Applicant would be able to purchase unsold capacity from the project for its own system (APP. X 326; Tr. 21,612; DJ 4,237).

AEC did respond to Applicant's thirteen point memorandum on July 1, 1970, during a meeting between the parties.[256] AEC indicated it would not accept the proposals of Applicant, although AEC was willing to consider various types of arrangements without limitation, as long as the arrangements were consistent with AEC's goals. AEC intended to remain a viable generation and transmission entity (DJ 4,238, DJ 4,240). But Applicant still wanted customer protection from AEC prior to interconnecting with AEC at Jackson. Applicant refused to discuss AEC's March 17 draft interconnection agreement which contained numerous provisions for coordination (DJ 4,240; Tr. 9,206; AEC X CRL-102).

In a subsequent meeting with AEC on July 22, 1970, Applicant again refused to discuss AEC's March 17 draft interconnection agreement, because it did not contain assurances that AEC would not take Applicant's wholesale customers, and because Applicant had not received the information it earlier requested from AEC (DJ 4,230). Instead, Applicant presented its own draft of an interconnection agreement with AEC. The agreement contained provisions for protection of each parties' respective customers (AEC X CRL-85). Applicant also stated it would not willingly enter into any arrangement with AEC which would facilitate and result in Applicant losing its wholesale customers (DJ 4,231). Throughout this period, Applicant continued to maintain this position, despite a later offer by AEC to enter into a customer protection agreement if

[256] AEC had by that time formed a "power contracts committee" to represent AEC and its members in dealing with Applicant on power supply matters.

Applicant would agree not to oppose AEC's plans for future generating facilities (DJ 4,227; AEC X CRL-88; DJ 4,232).

In the meantime, AEC continued to press for interconnection with Applicant at Jackson and requested REA to assist it in this regard (AEC X CRL-109). But Applicant insisted that it would interconnect with AEC at Jackson only if AEC would agree not to use the interconnection to displace or supplant service provided by Applicant (DJ 4,226).

Applicant, in October 1970, sent a draft document to REA containing various provisions including, among other things, a clause requiring termination or modification of AEC's 35-year all-requirements contracts with its members, a ten-year term with a firm rate for the first five years, a five-year notice requirement of planned changes in AEC's generating capacity or amount of power purchased from other suppliers beside Applicant, a stability charge for the interconnection at Jackson in addition to a service charge, economy energy transactions, emergency and maintenance service to AEC after it used up "protective capacity"[257] available from Applicant, and a reserve requirement equal to 15% of AEC's estimated peak demand with the requirement that AEC purchase "protective capacity" (AEC X CRL-103). Applicant also included a provision which gave it veto power over AEC's interconnection with other utilities (AEC X CRL-103).

In January 1971 in a meeting with AEC, Applicant restated that its position would be substantially the same as reflected in terms and conditions set forth in Applicant's draft sent to REA in October 1970 (DJ 4,225; APP. X JMF-63). Applicant also stated that interconnection and coordination would also be conditioned against AEC taking Applicant's customers (DJ 4,225).

AEC then sent a new draft agreement to Applicant in an effort to obtain interconnection and coordination (APP. X 172). Applicant then responded by submitting a newly revised proposal to AEC which eliminated the provisions for termination or modification of AEC's 35-year contracts with its members, but called for a general stability of customer allocation (APP. X 144).

In January 1972, AEC proposed certain changes to Applicant's latest revised agreement (APP. X 142). Finally, the parties executed an interconnection agreement on February 23, 1972, which became effective July 1, 1972 (DJ 3,013). This agreement includes many of the provisions Applicant proposed in its October 1970 draft. The agreement requires AEC to pay for "protective capacity,"

[257] The concept of "protective capacity" was developed by Mr. William R. Brownlee of Southern Services for use by the Southern System Operating Companies with small generating entities such as AEC, South Mississippi Electric Power Association, and Crisp County Electric Membership, which operate in the operating companies' service areas (DJ R7011; Tr. 25,944-25,956). It is nothing more than an "unusual charge" for capacity since no firm power is actually furnished under the concept (Tr. 25,948-25,949).

and contains no actual provisions for coordination of generation and transmission as proposed by AEC (DJ 3,013).

The Board finds that Applicant's persistent refusals to offer fair interconnection and coordination with AEC constitute anticompetitive conduct inconsistent with the antitrust laws. The record establishes beyond peradventure that Applicant's sole justification for not offering the interconnection and coordination requested by AEC was the fear of erosion of Applicant's wholesale business. Applicant consistently took the position in the five-year period between 1967 and 1972, when the limited interconnection agreement was finally entered into, that it would not interconnect and coordinate with AEC if it would result in AEC taking over service to certain of its member cooperatives which were then being served at wholesale by Applicant. While Applicant may have had a reasonable basis for refusing to interconnect and coordinate with AEC pending Federal court determination of the validity of AEC's 35-year all-requirements contracts with its members, which Applicant asserted to be violative of the antitrust laws, Applicant had no legitimate reason to do so after the 1968 Court decisions[258] affirming the validity of these contracts. From 1968 until 1972 when Applicant and AEC finally entered into a limited interconnection agreement, Applicant consistently refused to make fair interconnection and coordination arrangements with AEC, for the sole purpose of maintaining and protecting Applicant's wholesale customer business from competition by AEC. Applicant's refusals to offer AEC reasonable interconnection and coordination in these circumstances can only be viewed as anticompetitive, and inconsistent with the antitrust laws and their underlying policies. We find that Applicant's behavior in regard to offering AEC interconnection and coordination in this period evinces an anticompetitive intent toward AEC. The intent, which was prevalent during the late 1960's and into the early 1970's, in several other relationships between Applicant and AEC, actually began in 1962 and 1963 in regard to AEC's efforts to serve the wholesale power supply of Ft. Rucker, Alabama.[259] While we address these other instances of Applicant's behavior later in this decision, we find that Applicant's conduct in these cases is inconsistent with the antitrust laws, and warrants appropriate relief in respect to the Farley Plant license.

D. Applicant's Denial of Reasonable Access to Power Exchange Services– The 1972 Interconnection Agreement

The Department and AEC charge that Applicant has denied AEC reasonable access to power exchange services resulting from coordination, and point to the

---

[258] *Alabama Power Company* v. *Alabama Electric Cooperative*, 294 F.2d 672 (CA 5, 1968); *cert denied*, 393 U.S. 1000 (1968).

[259] *See* pp. 942-945, *infra*.

1972 interconnection agreement between Applicant and AEC as evidence of Applicant's denial. It is contended that this interconnection agreement is the product of Applicant's exercise of its superior bargaining position compared to AEC, and enables Applicant to increase its dominance over wholesale sales in central and southern Alabama (DJ PFF 10.01-10.27, AEC PFF 11.74).

The 1972 interconnection agreement provides for the purchase by AEC of deficit capacity and energy from Applicant to meet AEC's power requirements in excess of its generation (DJ 3,013, Sec. 5.05; Mayben, Direct, p. 48). The term of the agreement is 10 years unless terminated by appropriate notice (DJ 3,013, Sec. 1.01). The amount of power purchased is negotiated on an annual basis, with adjustments made in accordance with changes in AEC's loads and generating resources (DJ 3,013, Sec. 5.05). Under the agreement, AEC is credited with a certain amount of generating resources in determining the specific amount of power it purchases from Applicant (DJ 3,013, Sec. 5.03). The purchase price specified is $19.80 per kilowatt of capacity per year (DJ 3,013, Sec. 6.02). This rate is extremely favorable to AEC at the present time because of inflation which has occurred since the agreement was executed (Tr. 8,643-8,644).

The interconnection agreement also provides for emergency services, maintenance services, economy energy, and a reserve sharing arrangement (DJ 3,013, Secs. 6.03-6.05; Mayben, Direct, pp. 48-52). These types of services represent coordination and serve to enhance the reliability of AEC's electric system.

AEC is also required to maintain reserves equal to 15 percent of its peak load plus purchase "protective capacity" from Applicant (DJ 3,013, Sec. 5.06). The amount of protective capacity which AEC is required to purchase is equal to one half of the amount that AEC's largest generating unit exceeds the amount of standby capacity AEC contracts for from SEPA, which is about 50 megawatts (DJ 3,013, Sec. 5.06). The price for protective capacity is $4.00 per kilowatt per year (DJ 3,013, Sec. 5.06).

The agreement also establishes an operating committee, provides for spinning reserves, and specifies various points of interconnection with Applicant (DJ 3,013, Secs. 3.01-3.06, 4.01-4.03, 5.07).

The interconnection agreement, however, contains no provision for staggering of construction of generating units, no provision for transmission services, and no provisions for exchange of seasonal capacity[260] (Mayben, Direct, pp. 48-52). These types of services are also recognized as falling within coordination among electric utilities (Tr. 5,576-5,586).

The interconnection agreement includes a special four and one-half year notice provision on termination (DJ 3,013, Section 5.03). This termination

[260] Exchanges of seasonal capacity would not normally be expected between AEC and Applicant since both of their electric systems are summer peaking systems.

provision requires AEC to notify Applicant at least four and one-half years in advance of any plans concerning changes in AEC's generating capacity or amount of capacity purchased from others. The power AEC obtains from SEPA does not operate to invoke the four and one-half year notice provision (Section 5.03).

The Department and AEC harshly criticize specific parts of the agreement. In addition to the absence of provisions for staggering construction of generation, transmission services, and exchanges of seasonal capacity, the Department and AEC urge that the "protective capacity" charge imposed on AEC actually adds to AEC's cost of its power supply. This result is claimed to be contrary to one of the purposes of achieving coordination in the electric utility business. In addition, it is asserted that the "protective capacity" provision deters AEC from installing its own large scale generation, and denies AEC economic benefits normally flowing from coordination by unnecessarily increasing AEC's reserve obligation. In short, AEC is claimed to be gaining either minimal or insubstantial benefits under the agreement (Mayben, Direct, pp. 48-52).

The parties also contend that the special termination provision works to prevent AEC from engaging in short-term (one or two years) exchanges of capacity with other electric utilities (Tr. 1,637-1,646; Tr.5,446-5,448). According to the Department and AEC, AEC would incur an economic penalty if it engaged in a capacity transaction with another utility because, under the agreement, the capacity received would not be credited as a generating resource of AEC which reduces the amount of power AEC is obligated to purchase from Applicant. Since no transmission services are provided in the agreement, AEC allegedly cannot engage in capacity exchanges with other utilities in any event. Without such transmission services, it is stated that AEC would have no means of delivering or receiving power from another utility (Tr. 5,446-5,448).

The Board has carefully considered the 1972 interconnection agreement and all of its provisions. Although we have previously found that Applicant acted inconsistently with the antitrust laws in refusing to offer AEC fair coordination in the period 1968 to the time of execution of the interconnection agreement, on the principal justification of loss of business to a competitor, we are unwilling to hold that the agreement in and of itself denies AEC access to power exchange services in an anticompetitive manner. While it appears that Applicant and AEC could have agreed to engage in greater coordination, the failure to have done so cannot be termed anticompetitive without more substantial evidence. We especially note that the agreement actually operates to give AEC substantial financial benefits, because of the extremely favorable power purchase rate included. Under this rate, AEC has been able to avail itself of power purchases from Applicant at a cost much less than that which AEC would have incurred if it generated its own power supply. If anything, AEC's total cost of power has been substantially reduced over the few years the agreement has been in effect

from what it otherwise would have been had AEC generated the bulk of its power supply. AEC's own annual reports to REA bear this out (APP. X 146).

Moreover, the special notice provision appears reasonable to the Board, particularly since the record shows that both sides agree that notice is required in power supply contracts (Tr. 5,234; 5,952; 8,480; 8,523-8,526). In view of the length of time it takes to plan additions to generating facilities, we do not believe that the four and one-half year notice provision can be attacked as being anticompetitive in scope or effect. We also note that under the reserve sharing provisions of the agreement, AEC is required to maintain reserves equal to 15 percent of its peak load, plus pay for "protective capacity." These reserve sharing provisions effectively require AEC to carry reserves equal to about 17 percent of AEC's load. We are unable to find that this reserve obligation is unreasonable, and places AEC at a substantial economic disadvantage. The "protective capacity" provision, however, is an unusual means of specifying a reserve obligation, and the Board believes that it should be eliminated. We will require AEC and Applicant to redefine AEC's reserve obligation on a different basis in the future, leaving it up to the parties to decide upon the most acceptable fashion of stating reserve sharing.[261]

In the circumstances, we find that the 1972 interconnection agreement between Applicant and AEC is not anticompetitive in and of itself, and does not deny AEC power exchange services in an anticompetitive fashion.

E. Applicant's Denial of Ownership Participation by AEC and Municipal Distributors in the Farley Plant

Applicant is alleged to have denied AEC and the municipal distributors in central and southern Alabama ownership participation in the Farley Plant. Applicant's alleged denial of such ownership participation is termed inconsistent with the antitrust laws (DJ PFF 11.01-11.33; AEC PFF 12.01-12.25).

The record shows that in October 1969, Mr. Farley and Mr. Wesley Jackson, AEC's manager, had discussions about the Farley Plant in the context of their continuing discussions over interconnection[262] (APP. X 320). In August 1969, Mr. Jackson had advised Mr. Farley that AEC was not interested in ownership participation in the Farley Plant, but that some of AEC's members had expressed such an interest (Tr. 19,396; APP. X 320). The record does not show

[261] The Board is unwilling to order that reserves be shared on an equalized basis or in accordance with any particular formula at this juncture. It may be that the Board will do so after completion of evidentiary hearings in Phase II of this proceeding, if any, but we urge the parties to agree on this matter without Board intervention as part of these negotiations. *See* pp. 961-962, *infra*.

[262] *See* n. 255, *supra*.

whether AEC expressed interest in ownership participation in the Farley Plant between this date and 1971.

In March 1971, while the Farley Plant was under construction, AEC requested a meeting with Applicant to explore the circumstances under which AEC could meet part of its future power requirements from the nuclear units[263] (AEC X CRL-91). The parties met in April 1971, and have had subsequent meetings and discussions since that date on possible participation by AEC in the Farley Plant. Aplicant's representative expressed opposition to AEC's ownership because of a number of legal obstacles (AEC X CRL-93; Tr. 19,254). Applicant has also met with MEUA, and has provided estimates of the cost of power from the Farley Plant as well as discussed possible participation in ownership by municipal electric distributors in central and southern Alabama (Tr. 4,553-4,554; APP. X JMF-76). Under present Alabama law, however, MEUA cannot participate in ownership in the Farley Plant (Tr. 6,482-6,495).

Although these parties have engaged in numerous discussions, none has resulted in an agreement with Applicant for joint ownership arrangements in the Farley Plant. Applicant has repeatedly indicated that joint ownership of the Farley Plant would be precluded by numerous legal obstacles such as the present restrictions in Applicant's mortgages as security for its publicly held bonds, and local laws which accord joint owners the right of partition (AEC X 30; APP X JMF-A, pp. 535-539).

Speaking on behalf of Applicant, however, Mr. Farley has testified that the Company has not taken the position that it would not sell ownership in the Farley Units (Tr. 19,185; Tr. 20,599).

The record does show that Applicant has offered to sell AEC and the municipal electric distribution systems unit power from the Farley unit as a basis for access to nuclear power (Tr. 20,602, AEC X 29, AEC X 30, AEC X 31). Applicant has been willing to engage in numerous discussions on this point, but AEC appears to have refused consideration of unit power (Tr. 6,012-6,018; 9,848-9,858; 10,298; 10,335; 20,001-20,006).

We have examined the record on the question of whether Applicant has denied ownership participation to AEC and the municipal electric distribution systems. We find no hard evidence substantiating this charge, and on the contrary, Mr. Farley has made it quite clear in his testimony before the Board that Applicant does not take the position that it would not sell ownership. We believe, in these circumstances, that it would require speculation on our part to find that Applicant has acted inconsistently with the antitrust laws in its numerous discussions with AEC and the municipal electric distributors in central and southern Alabama regarding ownership participation in the Farley Units.

[263] By this time the Atomic Energy Commission published notice in the *Federal Register* requesting comments on whether licenses for the Farley Units should be issued (36 FR 3277, February 20, 1971).

F. Applicant's Refusal to Consider Coordination With Proposed Generation of the City of Dothan, Alabama

In 1966, the City of Dothan, Alabama, considered building a 200 kva coal-fired steam generating plant on the Chattahoochee River in Houston, Alabama (DJ 218). In May 1966, officials of the City of Dothan met with representatives of Applicant to negotiate a new power supply arrangement. During this meeting, the City officials inquired if Applicant would be interested in purchasing surplus power from a generating plant which the city had under construction (DJ 218). Applicant responded by offering to lease the city's electric distribution system (DJ 218).

Thereafter, the City of Dothan retained the consulting engineering firm of Gillespie Engineers of Jacksonville, Florida, to advise it with respect to negotiations with Applicant for power supply, as well as to investigate Dothan's self-generation potential as an alternative to the city's continued purchase of power from Applicant (APP. X 9). The consulting engineering firm concluded that it was in the best interest to the City of Dothan to continue purchasing power from Applicant rather than self-generation (APP.X 9).

The Department asserts that Applicant did not desire to have competing generation located in southeast Alabama, and displayed a lack of interest in purchasing surplus power from Dothan's proposed generation, all of which constituted a refusal to engage in coordinated development necessary to make the city's proposed generation plant economically feasible. The Department says Applicant never offered any justification for its refusal to engage in coordination with the City of Dothan in connection with this proposed generating plant (DJ PFF 12.01, 12.03).

The Board has examined the record on this subject and can find no evidence that Applicant ever refused to offer the City of Dothan coordination with respect to the city's proposed generating plant. Although the record indicates that the City of Dothan had under consideration in 1966 the possibility of constructing a generating unit, the city engaged consulting engineers to advise it with respect to this matter. The consulting engineering firm later concluded that self-generation was not a realistic alternative to the City of Dothan.

The Board is unable to find any basis upon which to rest a finding that Applicant actually refused to engage in coordination with the City of Dothan in regard to this matter. The only material containing a record which in any way deals with the subject is the memorandum prepared by Mr. Clyde Wood, an employee of the Applicant, who reported to the company on the April 1966 meeting which representatives of Applicant had with the City of Dothan to discuss a new wholesale power supply arrangement (DJ 218). A Dothan city employee had also written a letter sometime earlier referring to a "50,000 KWH" generating plant the city was considering (DJ 4,011). The record shows

that the City of Dothan did not give this matter serious consideration beyond engaging an engineering firm to advise with respect to self-generation, and, in any event, no specific official request for coordination for the City of Dothan to Applicant had ever been made. In these circumstances, we refuse to find that Applicant would not consider coordination with the City of Dothan, and in doing so, acted inconsistently with the antitrust laws. In fact, we are surprised that the Department would make such a serious charge on such slim evidence as the two documents (DJ 218; DJ 4, 011) submitted to establish that Dothan planned to construct its own generating unit and requested Applicant to coordinate, which was refused. This entire charge is absurd and did nothing more than waste the Board's time and the resources of this agency.

G. Contract Provisions Precluding Competing Generation and Transmission

The Department and AEC charge the Applicant has imposed conditions in its contractual arrangements with AEC, or has interpreted such arrangements, to prevent AEC from installing its own generation and transmission or obtaining power from alternative sources which would be used to compete with the Applicant (DJ PFF 13.01; AEC PFF 15.01-15.04). Moreover, the Department claims that Applicant had, until its more recent filings with the Federal Power Commission, entered into contractual arrangements with municipal distributors in central and southern Alabama which expressly prohibited those distributors from using an alternative source of power (DJ PFF 13.02). Finally, the Department asserts that Applicant has rewritten several agreements with municipal distributors in order to preclude competing self-generation and transmission.

As an example of Applicant's conduct, the Department alleges that in 1970 when power from the SEPA project became available to preference customers in central and southern Alabama, Applicant modified contractual restrictions contained in its agreements with municipal distributors which precluded them from using an alternative source of power so as to enable the municipal systems to contract with SEPA for their allocation of power. But the Department says that these contracts were modified to include the condition that delivery of SEPA power by Applicant to the municipals would only be upon Applicant supplying all of their remaining power requirements.

The Department says the effect of these provisions precluded the municipal systems from using power from any source other than SEPA and Applicant (DJ PFF 13.03). In addition, the Department alleges that in connection with the SEPA agreement entered into in 1970, Applicant negotiated directly with SEPA without the participation of the preference customers in central and southern Alabama, and SEPA accorded the preference customers less than a month to reach a decision on the proposed agreement which it worked out with Applicant (DJ PFF 13.03).

The record reveals that Applicant's contractual arrangements with AEC and municipal distributors have contained provisions which operate somewhat to discourage these parties from installing their own generation and transmission or acquiring other sources of power (DJ 3,012; APP. X JSV-33; APP. X JSV-34; DJ X 216; DJ X 225; DJ X 226; DJ X 227; DJ 3,013). But the record contains no evidence that these contractual provisions were intentionally and purposefully inserted so as to prevent AEC and the municipal electric distributors from installing their own generation and transmission. The record establishes that the provisions were partially inserted to establish a firm market to justify Applicant's investment in electric facilities, in the same manner as AEC's 35 and 40-year all-requirements contracts with its member distribution cooperatives (APP. X BMG-A, (Guthrie), pp. 62-63; Tr. 6,394-6,395). But the record shows these provisions do prevent the municipals from obtaining alternative sources of power.

Accordingly, the Board rejects the Department's charges that Applicant inserted contractual provisions in its various agreements with AEC and municipal electric distribution systems for the purpose of precluding competing self-generation and transmission, but agrees that they are anticompetitive in regard to precluding alternative sources of supply (see pp. 936-937, *infra*.).

H. Prevention of SEPA Transmission and Control of SEPA Resources

The Department alleges that Applicant effectively prevented SEPA from constructing its own transmission facilities in the early 1950's to market surplus power from the Federal hydroelectric projects to preference customers and various southern states. Applicant's alleged opposition is termed inconsistent with the antitrust laws (DJ PFF 15.01-15.31).

In the early 1950's, SEPA's first administrator, Mr. Ben Creim, conceived a plan for the government to construct high voltage transmission lines linking or integrating various Federal hydroelectric projects constructed by the Corps of Engineers for the purposes of delivering power to major load centers (DJ 401; DJ 410; Tr. 15,177-15,183). The record shows that Mr. Creim apparently proposed such construction because private utilities in the southeast had generally refused to enter into wheeling and firming of power agreements suitable to SEPA. Instead, these utilities had proposed to purchase all of the power from the Federal hydroelectric projects at the bus-bar and then sell a quantity of firm power to preference customers (Tr. 15,182; 15,240; DJ 401; DJ 412).

In 1952, SEPA requested an appropriation of funds from Congress for the construction of transmission lines, including funds for actual construction of certain lines and funds for further studies to be made for construction of other transmission lines. In particular, SEPA requested funds for the actual construction of 115 kv line from the Jim Woodruff Federal hydroelectric project in Alabama to the Wire Grass Cooperative located in southeast Alabama. This

transmission line was never constructed (Treadway, Direct, p. 7; Tr. 10,665-10,668; Leavy, Direct, Tr. 15, 185; DJ 401; DJ 410; DJ 421; DJ 421A).

Applicant opposed all of these and other similar proposals before Congress arguing that such construction would duplicate transmission facilities unnecessarily, and that Federal funds should not be used for such purpose (DJ 406; DJ 408; DJ 422; DJ 423).

In 1952, Congress adopted a rider to an appropriation bill which repudiated the construction of duplicate transmission facilities with Federal funds (Public Law No. 82-470, 66 Stat. 445).

The Board finds that Applicant's opposition to the SEPA proposal before Congress was permissible under the *Noerr-Pennington* doctrine, and, in any event, the record shows Applicant's efforts have not been shown to have had an anticompetitive purpose.

The Board is unable to find that Applicant's opposition to the construction by SEPA of high voltage transmission lines in the southeast constituted anticompetitive conduct. The Board believes that Applicant was reasonably opposed to the construction of such lines on the basis of wasteful duplication of transmission facilities. The Board finds no need to examine in more detail the events and occurrences concerning the early SEPA proposals, including the proposals of the Southern Company to enter into contractual agreements for the purchase and delivery of power from Federal hydroelectric projects to preference customers in the southeast, except to describe the origin of certain provisions in the current SEPA agreement with Applicant (DJ 3,012), which are alleged to be anticompetitive in nature and effect. We are unpersuaded that Applicant acted with anticompetitive intent and purpose in connection with the early SEPA proposals to construct transmission. The present SEPA agreement with Applicant is another matter, however, and we have examined the agreement and its various provisions in their entirety. Our findings, with respect to this agreement, are set out immediately hereafter.

I. The 1970 SEPA Contract

On June 19, 1970, Applicant and SEPA entered into an agreement which provides for wheeling and firming of power from various Federal hydroelectric projects to preference customers in Alabama (DJ 3,012).

In Section 4.2 of the agreement, it is provided that unless the preference customer purchases all of its supplemental power from Applicant (that is power needed over and above the SEPA allotment, and power generated by their own resources), Applicant is not obligated to wheel power from the Georgia Project to the preference customer (DJ 3,012, Section 4.2). The agreement also provides in Section 10.3 that Applicant will contract with each preference customer of the government to supply the additional power required by the preference cus-

tomer. This section enables Applicant to implement Section 4.2. Applicant has modified its power supply agreements with preference customers to include a provision that requires the preference customer to purchase all of its additional power from Applicant. SEPA has inserted similar provisions in its contracts with preference customers in order to give effect to Section 4.2.

The Department, AEC, MEUA and Staff contend that Section 4.2 of the agreement is anticompetitive in nature and effect because it enables Applicant to control SEPA's resources to prevent competition by utilities in central and southern Alabama. These parties assert that, as a practical matter, under Section 4.2 there is no way that preference customers can obtain government power made available to them unless they purchase all of their additional power requirements from Applicant, that this provision is not necessary for the effectuation of government policy respecting the marketing of surplus power from Federal hydroelectric projects, and that Section 4.2 acts as a deterrent to municipal systems in central and southern Alabama from seeking alternative sources of bulk power (Tr. 5,940-5,941; 6,373-6,380; 14,700-14,704; 15,213; St. John, Direct, pp. 18-19).

The requirement that a preference customer purchase all of its supplemental power from the Applicant as a condition of Applicant's obligation to wheel government power, as specified in Section 4.2 of the 1970 SEPA agreement with Applicant, was originally conceived in the early 1950's as a part of a proposal advanced by Georgia Power on behalf of itself and its affiliates in the Southern System. The evidence shows that Applicant acceded to this proposal (DJ 406-408, 422-423, 6,007-6,014). Approximately three days after SEPA was formed in 1950, Georgia Power proposed to purchase at the bus-bar the entire output of several Federal hydroelectric projects in existence or planned in the service territories of the Southern System Operating Companies, and subsequent delivery by those companies of an equivalent amount of firm power to preference customers (DJ 402, DJ 403, DJ 410, DJ 411, Tr. 15,189-15,190, Tr. 15,222, Treadway, Direct, pp. 9-11). This concept required the preference customers, as a condition of receiving surplus power from the Federal hydroelectric projects, to purchase the balance of their power supply from the operating companies of the Southern System in their respective areas (DJ 402, DJ 405, Tr. 15,221-15,222, Tr. 10, 349-10,356).

The Georgia Power proposal was opposed by rural distribution cooperatives in Georgia, and ultimately, SEPA rejected the notion as violative of the purpose and intent of Section 5 of the Flood Control Act of 1944 (Treadway, Direct, pp. 11-12; Tr. 15,189, Tr. 15,191; DJ 410, DJ 411).

The concept later appeared in a proposal labeled as the "tri-contract" arrangement, a proposed contractual relationship which resulted from negotiations between Georgia Power and the U.S. Department of Interior respecting the marketing of power from the Clark Hill Federal project in Georgia (Treadway,

Direct, p. 12; Tr. 10,436-10,437; DJ 416; Tr. 15,266-15,267). The rural cooperatives in Georgia also opposed this arrangement and the Secretary of Interior, who had originally developed the "tri-contract" idea, submitted the question of its legality to U.S. Attorney General, Herbert Brownwell. On July 15,1955, the Attorney General issued an opinion ruling that the sale of all government power from Federal hydroelectric projects at the bus-bar to a private utility, when preference customers were seeking to purchase the power, would violate Section 5 of the Flood Control Act (DJ 409, DJ 417, Treadway, Direct, pp. 12-13).

Shortly after the Attorney General issued his opinion, Mr. Harllee Branch, Jr., then President of Georgia Power, informed the Department of Interior that Georgia Power would agree to enter into a contract for the wheeling and firming of SEPA power from Clark Hill Project, but that Georgia Power would only wheel power on the condition that preference customers purchase all of their supplemental power requirements from Georgia Power (DJ 412, Tr. 15,214). Various draft agreements were then prepared which included a Section 4.2 substantially the same as appears in the 1970 agreement between SEPA and Applicant (DJ 412, DJ 413; Tr. 15,214). Although the cooperatives in Georgia vigorously objected to the inclusion of this provision, SEPA accepted and included it in its agreement with Georgia Power for the firming and wheeling of power from the Clark Hill Project. This agreement was entered into in May 1956 (APP. X 179).

This provision has continued to appear in subsequent SEPA agreements with Georgia Power for disposition of power from other Federal hydroelectric projects in Georgia. When SEPA prepared a draft agreement for the disposition of power from the Miller's Ferry Project in Alabama, which was coming on line in late 1969 or early 1970, SEPA included Section 4.2. Georgia Power was to be a party to that agreement along with Applicant, and SEPA recognized that Georgia Power had always insisted upon such a provision in the past (Tr. 14,704-14,705; 15,223-15,224). Accordingly, the provision was brought forward and included in SEPA's June 1970 agreement with Applicant for wheeling and firming of power from Federal projects for delivery to preference customers without any substantial negotiation.

The evidence of record shows that no engineering or economic justification was ever urged in support of Section 4.2, either in its original concept or in all the negotiations among Georgia Power, SEPA and the Department of Interior, or between Applicant and SEPA in connection with the various contracts to firm and wheel power from Federal hydroelectric projects (Tr. 15,315-15,316; Tr. 4,768-4,769). The record also indicates that SEPA at least partially accepted the provision in 1956 in order to obtain an agreement with Georgia Power to firm up power from Clark Hill that SEPA was marketing to preference customers. Being without transmission facilities, SEPA had to have such an agreement in

order to market the surplus power from the Clark Hill Project (Tr. 15,213-15,216; 15,218-15,220; 15,289-15,290). Section 10.3 of the 1970 SEPA agreement with Applicant enables Applicant to implement Section 4.2.

Georgia Power's insistence on a provision such as Section 4.2, in agreements to firm and wheel power from Federal projects, was to protect the Company from the loss of loads of preference customers (15,289-15,290). We do not find this reason to be sufficient justification for what is tantamount to an exclusive dealing arrangment. As the provision has been carried forwarded and included in the present SEPA contract with Applicant, it follows that it is also equivalent to an exclusive dealing arrangement. We find it to be inconsistent with the antitrust laws and their underlying policies.

Although it has been SEPA's policy from its inception to obtain assurances in wheeling and firming agreements with private utilities that the purchase of power by preference customers must not result in the preference customer paying more than it otherwise would for supplemental power, such a policy does not, and cannot serve as justification for the effect of Section 4.2. The record shows that SEPA has no particular interest in the source from whom a preference customer obtains its supplemental power (Tr. 14,699, Tr. 15,205). The record also discloses that SEPA does not consider Section 4.2 necessary for the effectuation of its policies concerning the marketing surplus power to preference customers from Federal hydroelectric projects (Tr. 14,700, 15,213). Moreover, the provisions in SEPA's contracts with the preference customers which give effect of Section 4.2, are unnecessary for the effectuation of SEPA's policies concerning the sale of surplus power to these customers. These provisions have been included in the SEPA preference customer agreements in order to be consistent with Section 4.2 (Tr. 14,701-14,704).

Significantly, SEPA has expressed concern to Applicant over the effect of Section 4.2. In 1973, the Administrator of SEPA wrote Applicant advising Applicant that should Applicant attempt to refuse to carry out its obligations to wheel power because a preference customer refused to purchase all of its supplemental power from Applicant, that the matter would be referred to the Department of Justice. SEPA recognized that, in view of the Supreme Court's Decision in *Otter Tail,*[264] the restrictions contained in Section 4.2 may have antitrust consequences. On June 6, 1973, Applicant's President, Mr. Joseph M. Farley, replied to SEPA's Administrator claiming that Section 4.2 was necessary for protection of the economic considerations on which Applicant originally agreed to wheel power from the several Federal hydroelectric projects, Although Mr. Farley's comments attempted to provide a rationale in economic terms for the inclusion of Section 4.2, the claimed economic basis for Section 4.2 is clearly

[264] *See* p. 856, *supra.*

insufficient to overcome its anticompetitive effect. The provision deters preference customers from seeking alternative wholesale power and aids Applicant in maintaining its dominance in the wholesale market in central and southern Alabama. We find this to be inimical to the antitrust laws.

Accordingly, we find that Section 4.2 in the SEPA agreement with Applicant is anticompetitive in nature and effect. There is no adequate justification for the inclusion of this section in the agreement, and we find that the section represents an exclusive dealing arrangement proscribed by the antitrust laws and the policies underlying such laws.

J. Applicant's Price Squeeze

A price squeeze involves the economic behavior of a vertically integrated firm *viz a viz* rival who is not similarly integrated. If a manufacturer both marketed its product through its own distribution channel and sold to independent distributors as well, the manufacturer would be engaging in a single price squeeze if it unduly raised the wholesale price to the independent distributors who competed with the manufacturer at retail. A double price squeeze occurs if, in addition to the tactic just mentioned, the vertically integrated manufacturer unduly lowered the retail price of the product in its own outlets as well.[265]

MEUA argues with singular vigor that Applicant has engaged in a price squeeze. MEUA contends that Applicant's rate for wholesale power to MEUA members, in conjunction with the retail rate Applicant charges its industrial customers, constitutes a price squeeze. Applicant allegedly sets a rate to industrial customers such that MEUA members, buying from Applicant in the wholesale power market, are unable to compete fairly with Applicant for these loads in various retail markets. MEUA contends that the matching of Applicant's retail industrial rates does not permit them to cover a member's costs (including a return on the cost of capital) and the member's competitive potential is thereby enervated. Furthermore, MEUA holds that the price squeeze exists whether a member takes power from Applicant directly at the load (and performs the selling and billing function) or the member performs the distribution function

[265] The Board rejects the definition of a price squeeze proposed by MEUA witness Karl B. Porter (MEUA X 1A, (Porter Supplemental Direct) pp. 1-2). According to his definition a price squeeze occurs whenever a nonintegrated retailer cannot buy at wholesale from an integrated firm "at a rate sufficiently low to enable it to compete . . ." with the integrated firm "and produce a positive margin sufficiently high to cover the [retailer's] costs." The protectionist thrust of such a definition is apparent. It entails the survival and prosperity of the nonintegrated firm regardless of its relative cost structure and efficiency. The appropriate focus of a price squeeze charge is on the integrated firm and its costs. One should inquire whether its rates at wholesale are significantly above its costs and whether its rates at retail are below its costs. *See United States* v. *Aluminum Company of America*, 148 F.2d 416, 436-438 (CA 2, 1945).

using its own facilities (*Cf.* MEUA X 21 and MEUA X 22 with MEUA X 8, MEUA X 11, MEUA X 19).

The Department, AEC and Staff have not focused on this alleged aspect of Applicant's conduct. If anything, the record shows that MEUA stands in opposition to those parties on this matter. The Department claims that Applicant's wholesale rates to nonintegrated customers have not been too high, as a price squeeze would entail, but rather too low, to the end that buyers would be dissuaded from constructing their own generation facilities (see DJ PFF pp. 92-103; Wein, Direct, p. 136). The Department also asserts that Applicant formerly maintained a dual rate structure[266] on rates applicable to cooperative and municipal customers, and this rate structure once had the same effect as a price squeeze by hampering these wholesale customers in competing with Applicant for industrial loads (Wein, Direct 135; St. John, Direct, pp. 37-38; see also Lowman, Direct, pp. 128-129). The remoteness of these dual rates[267] alone might make them of little significance in this licensing proceeding. But in any event, the record shows that the Department's anticompetitive allegations about Applicant's dual rates are without foundation (see Tr. 4,038-4,043; APP. X 22; APP.X BJC-A, (Crawford) pp. 188-190). Using the City of Lafayette as an example, the cross-examination of the Department's own witness, H. Sewell St. John, revealed that: (1) the dual rate, contrary to being imposed by Applicant, was the result of negotiations between the City, Applicant and the Alabama Public Service Commission; (2) that the dual rate actually *lowered* power costs to the City; and (3) that the dual rate had no effect on altering or raising the industrial and commercial rates charged by the City (Tr. 4,038-4,044). Consequently, we find no inconsistency with the antitrust laws in Applicant's maintenance of dual rates in the time period 1936 to 1945.[268]

There are two questions this Board addressed in considering Applicant's alleged price squeeze: (1) whether a price squeeze occurred;[269] and (2) if so, does it apply to a significant amount of commerce or business.

---

[266] The dual rate provided for a reduction in the cost of purchased power based on the quantity of power sold to residential customers of the distribution entity (see APP. X BJC 57 and 58).

[267] Applicant maintained dual rates in the period 1936 to 1945.

[268] Indeed in light of these facts in the record, the Board finds the dual rate charge to be specious and is surprised that it continues to be made by Department.

[269] MEUA's Brief and Proposed Findings of Fact contains 52 pages of data and tables on the price squeeze issue. Applicant has urged this Board to strike these data and their contained calculations on the ground that "it comes too late and Applicant has had no opportunity to either (a) test the accuracy of the data or (b) offer rebuttal evidence" (Applicant's Reply Brief, p. 884). The Board agrees. Some of the data presented in these manifold tables goes beyond mere arithmetic calculations in their import and are now presented for the first time, long after MEUA had ample opportunity to make its record on the price squeeze issue during the evidentiary phase of the hearing. The Board therefore grants Applicant's motion to strike this material, and orders it stricken from the record.

To ascertain whether a price squeeze has occurred is not an easy exercise in arithmetic and accounting. As presented in this proceeding the issue was particularly entangled because the calculations involved numerous assumptions about load factors, voltage levels, fuel adjustment clauses, the allocation of SEPA costs, the amount of power lost due to transmission, distribution and stepdown considerations, the operating expenses and cost of capital of the parties involved, and other such factors. For example, MEUA apparently concurs with Applicant that MEUA's early calculations were inappropriate because incorrect fuel adjustment figures applied (MEUA, PFF, p. 63).

Certainly from a broad perspective, the seriousness of any price squeeze by Applicant is not apparent to the Board. We see no evidence that MEUA members are anything but financially viable;[270] moreover, we see no evidence that Applicant is serving retail customers at less than either long-run average or long-run incremental costs. Looking at the matter in more detail, the record shows that Applicant's revenue from retail customers at various voltage levels generally exceeds its revenue for a similar amount of power to a wholesale customer.[271] This result weakens the charge of a general price squeeze by Applicant, since such a tactic would entail, at least in the extreme, just the opposite result. Further vitiating the price squeeze contention is MEUA's attempts to show such a tactic, by reference to a retail rate of Applicant allowed by the Alabama Public Service Commission in 1975. This rate, however, was *less* than Applicant had requested.[272] If Applicant had been trying to squeeze out the potential competition at retail from its wholesale customers, in the manner suggested by MEUA, Applicant's behavior in its rate filing with the Alabama Commission is, indeed, strange.

This raises the question of the significance and extent of retail competition for industrial loads of this magnitude. As this Board has already indicated, the opportunities for competition between retail entities located in central and south Alabama are very limited. In the past, both MEUA members and Applicant have behaved in such a fashion as to show their mutual lack of enthusiasm for head-to-head, unfettered retail competiton. Retail loads within a distribution entity's service territory are generally served by that entity. MEUA witness Porter was unable to give any examples of industrial loads lost by municipal distributors because of the alleged price squeeze.[273] The Board finds that even

---

[270] Department witness H. Sewell St. John, who is Secretary-Treasurer of MEUA, testified that the municipal distributors in central and south Alabama which take their power from Applicant have generally been profitable operations (St. John, Tr. 4,079). *See also* APP. X BJC 20, 21 and 22 for evidence on the financial viability of various municipal and cooperative distribution systems in central and south Alabama.

[271] APP. X 253, 254, 255.

[272] Tr. 22,419.

[273] Porter, Tr. 5,979-5,981, 6,087-6,088.

if there were a price squeeze at retail, the record does not support a finding that it is of sufficient significance to be of concern in meeting our responsibilities under Section 105c.

The usual role of a price squeeze allegation in a nuclear licensing proceeding is to cast light on the purpose and intent of an applicant as to its competitive behavior. To this end, we have fully examined and evaluated the alleged price squeeze to determine what evidence it presents of the intent and purpose of Applicant in its competitive relationship with other parties. We find no evidence of a price squeeze of sufficient magnitude to support such an allegation.

K. Applicant's Abuse of Administrative and Judicial Processes

AEC contends that the Applicant has misused administrative and judicial processes against it to prevent its acquisition and expansion of generation and transmission facilities, and to reduce or eliminate its ability to compete as a wholesale power supplier. AEC asserts that such conduct is not protected under *Noerr-Pennington* and that it falls within the "sham exception" to that doctrine. It is further argued that such conduct shows the Applicant's purpose and intent to monopolize in the relevant market (AEC PFF 14.01-14.43).

The Department has asserted that the Applicant misused its monopoly power by successsfully preventing AEC from installing generation. It has also described the prolonged and extensive legal battles to halt or delay the construction of generation in the early 1960's. However, the Department has charged that this amounts to sham litigation (DJ PFF 6.01-6.29). The Staff has taken a similar position in this regard (Staff PFF 4.17-4.19).

The Applicant contends that its efforts to influence governmental activity, including litigation and appearances before administrative bodies, are constitutionally protected under the First Amendment and are insulated from antitrust scrutiny under the *Noerr-Pennington* doctrine. It also denies that its conduct falls within the sham exception to that doctrine (APP. PFF L-83-L-106).

The Applicant's conduct involved two periods, in the 1940's and in the early 1960's, when various steps including the commencement of legal and administrative proceedings were taken to challenge AEC's plans to construct new generating facilities. The basis of the Applicant's opposition was that the proposed generation and transmission facilities were to be used to serve customers it already supplied with electricity, and resulted in duplication of facilities in violation of the Rural Electrification Act. Some of the Applicant's administrative and legal opposition was successful, and some of it was not. We have already extensively reviewed these facts, and have concluded that the Applicant lawfully opposed AEC's proposals to construct new generation and transmission in the 1940's, on the grounds that they involved unnecessary and wasteful duplication of facilities contrary to the express purpose of the REA and the public inter-

est.[274] Similarly, we have concluded that the Applicant's efforts to challenge AEC's projects connected with the H-Loan in the 1960's, by litigation as well as administrative and lobbying efforts, did not constitute anticompetitive conduct inconsistent with the antitrust laws. The issues Applicant raised were reasonably open to dispute and the means of raising them were deemed to be appropriate under the circumstances.[275]

Under the *Noerr-Pennington* doctrine, there is an immunity from antitrust liability for the appropriate use of judicial and administrative processes, even if the purpose is to eliminate competition.[276] This right of access to courts and agencies is based upon limits to both the scope and purpose of the Sherman Act, as well as the right of petition protected by the First Amendment. However, this immunity is also subject to the sham exception.[277] In the adjudicatory area, the sham exception has been held applicable to "the use of administrative or judicial processes where the purpose is to suppress competition evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims."[278] The sham exception has also been applied where there emerged "a pattern of baseless, repetitive claims" which effectively barred competitors from access to the agencies and courts, and hence constituted an abuse of the administrative and judicial processes.[279]

In the instant case, our prior findings that the Applicant's resort to the courts and administrative agencies was appropriate under the circumstances have the effect of extending *Noerr-Pennington* protection to this conduct. Since such conduct was held to be appropriate under all the circumstances of record, it would not fall within the sham exception, because there was no pattern of baseless claims, nor repetitive lawsuits bearing the hallmark of insubstantial claims. Consequently, there was no abuse of judicial or administrative processes which could constitute cognizable anticompetitive conduct. It would also follow that there is no room for application of *Pennington* footnote 3 regarding the admissibility of immunized transactions to shed light on the "purpose and character" of nonimmunized transactions,[280] because the challenged litigation was both immunized and itself not anticompetitive under the antitrust laws.

However, our holding permissible the Applicant's conduct regarding the use of judicial and administrative processes does not exhaust our analysis of its

---

[274] *See* pp. 902-905, *supra*.

[275] *Supra*, at pp. 905-908.

[276] *See* Section VI, Legal Standards, at pp. 867-872, *supra*.

[277] *Id.*, at pp. 867-868, 869-870.

[278] *Otter Tail Power Company* v. *United States*, 410 U.S. 366, 380 (1973).

[279] *California Motor Transport Company* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972). *See also* pp. 870-872, *supra*.

[280] *See* pp. 868-869, *supra*.

antitrust implications. These facts will next be considered in connection with the Applicant's activities in the Ft. Rucker transaction.

L. The Ft. Rucker Transaction

In 1962-63, the Applicant and AEC were involved in the former's opposition to AEC's efforts to bid competitively for the supply of wholesale power to Ft. Rucker, Alabama. Applicant had been supplying wholesale power to the installation for some years, and it endeavored to persuade the military authorities that AEC was not in a position to supply such power, and hence, should not be permitted to submit a competitive bid. AEC contends that Applicant used its prolonged litigation to block the consummation of the H-Loan to obtain an unfair competitive advantage in the Ft. Rucker transaction (AEC PFF 14.38). The Department asserts that in competing with AEC to serve the Ft. Rucker load, the Applicant would have refused to sell power to AEC for that purpose (DJ PFF 7.21, 17.09). The Staff also refers to this claim by Applicant that AEC lacked sufficient bulk power resources to be permitted to bid to serve Ft. Rucker (Staff PFF 4.12).

Applicant defends its conduct as involving "the product of the H-Loan proceeding, not the intent," and argues that seeking to prevent a violation of law is a laudable goal (APP. Reply Br p. 841).

The evidence shows that in November 1962, REA made an allotment of $20,350,000 to AEC to enable it to construct a steam generation plant at Jackson, Alabama, and to construct 710 miles of transmission line. This allotment, of course, became known as the H-Loan. By a letter dated November 21, 1962, Alvin W. Vogtle, Jr., then the Applicant's Executive Vice President, pointed out to a company representative that the company had been permitted to intervene in the hearing before the State Finance Director on AEC's application to obtain approval of its execution of notes to REA. The letter described the duration of litigation which would result from a possible series of appeals up to the Supreme Court of Alabama, and stated that "Consequently, I am unable even to guess at the length of time which may be consumed in obtaining a final decision. . . ." Since a final approval must be obtained before any funds could be made available to AEC, Mr. Vogtle observed: "It should be apparent, therefore, that the availability of that portion of the transmission line (shown in orange) extending from Walter F. George Dam to Ft. Rucker is highly doubtful at this time" (DJ X 4,005).

At a meeting on November 29, 1962, between representatives of the Applicant and the Army, it was noted that the military representative was "quite surprised" to learn that AEC's loan had to be approved by the State Director of Finance. There was a discussion of whether in view of this a competitive situation existed or competitive bids were required (DJ X 4,004).

On February 7, 1963, agents of Applicant gave a lengthy memorandum to Lt. Col. Warren Rogers, Center Engineer at Ft. Rucker (DJ X 4,001, 4,006). This detailed analysis prepared by Applicant was designed to persuade the Ft. Rucker authorities that AEC did not have an adequate transmission system to provide reliable service. The pending H-Loan litigation, including the injunction against AEC from the Circuit Court and its appeal to the Supreme Court of Alabama, was described. The memorandum stated that the only power supply contract between AEC and Applicant was terminable on 90 days notice, and that the latter,

> Is not required to operate and maintain its system in such a manner as to enable Alabama Electric Cooperative, Inc., to take power under the contract referred to above and furnish service to Fort Rucker or any other customers served by Alabama Power Company. . . . (DJ X 4,006, p. 4).

It was further noted that without a supply of deficit power from Applicant, AEC did not have sufficient existing capacity to serve its loads and Ft. Rucker, nor were adequate transmission lines to Ft. Rucker then available to AEC. It was stated that pending conclusion of the H-Loan litigation, the construction of transmission lines to Ft. Rucker was prohibited by the injunction obtained from the Circuit Court.

Finally, on November 15, 1963, Applicant's representatives met with the military authorities in an effort to persuade them that AEC was not in a position to supply power, using the memorandum of February 7, 1963, as a basis for this contention. Applicant's memorandum of this November meeting reads as follows:

> We again stated to Col. Rogers that Alabama Power Company would not supply power to Alabama Electric Cooperative for furnishing power to Ft. Rucker. Col. Rogers apparently was under the impression that as a regulated public utility, the company would be required to furnish power to anyone requesting service. We answered this by stating that contracts for large quantities of power were negotiated and that we would not negotiate a contract with Alabama Electric Cooperative under such conditions (DJ X 4,001).

James H. Miller, Jr., Applicant's former Vice President and now an officer of Georgia Power, candidly admitted on cross-examination (he had not addressed the subject in his written direct testimony) that he had attended the meeting of November 15, 1963, that he had seen the memorandum describing that meeting (DJ X 4,001), that he had prepared the lengthy analysis of AEC's generation and transmission system (DJ X 4,006), and that the latter study had been given to Col. Rogers of Ft. Rucker prior to that meeting (Tr. 21,542; 21,553-21,557; 21,583). Mr. Miller attempted to gloss over the impact of these documents by his somewhat vague memory of the "impression" which he felt

must have been given to Col. Rogers concerning the ability of Applicant to refuse to supply wholesale power to AEC, but we do not find such testimony to be credible (Tr. 21,560; 21,572-21,573; 21,575; 21,582). This witness also sought to justify Applicant's conduct in this transaction by referring to the low rate of interest on the REA loan to AEC and to the limitations in the Rural Electrification Act concerning loans to provide service to customers already receiving central station service (Tr. 21,589). Such justification cannot be accepted as a matter of law.[281]

The documents and testimony described above clearly show that Applicant abused its monopoly power in the generation and transmission of wholesale power to attempt to foreclose competition and to gain a competitive advantage.[282] Applicant knew full well and proved by its detailed study that it was then the sole wholesale power supplier with sufficient generation and the necessary transmission to serve Ft. Rucker. It also knew that AEC was a would-be competitor which sought to compete for the business by using the new generation and transmission facilities it intended to construct from the proceeds of the H-Loan. Applicant had initiated litigation and obtained an injunction to prevent or delay the consummation of that loan. It had also projected the extensive delay which would result from such litigation and successive appellate procedures, even if AEC were ultimately successful in the courts.

Although we have previously held that such litigation was not sham and was not anitcompetitive in and of itself, this does not mean that Applicant was free to couple immunized litigation with other unlawful conduct in order to accomplish a proscribed purpose or effect. As the courts have stated, if the end result is unlawful, it matters not that the means used in violation may be lawful.[283] The evidence shows that Applicant repeatedly informed the authorities at Ft. Rucker that the pending litigation would be prolonged, with the result that AEC would not have the necessary generation and transmission to serve the load with its own existing resources. Linked to these facts was the stated intention of Applicant that "Alabama Power Company would not supply power to Alabama Electric Cooperative for furnishing power to Ft. Rucker. . .we would not negotiate a contract with Alabama Electric Cooperative under such conditions" (DJ X 4,001). This stated intention amounted to the threat of an unjustified refusal to deal or sell wholesale power for the purpose of preventing AEC from submitting a competitive bid. In effect it was a proposed one-man boycott, and hence, a misuse of market power by a dominant utility.[284]

---

[281] *See* Section VI, Legal Standards, at p. 877, *supra.*

[282] *United States* v. *Griffith*, 334 U.S. 100, 107 (1948). *See* also pp. 853-856, *supra.*

[283] *California Motor Transport Company* v. *Trucking Unlimited,* 404 U.S. 508, 515 (1972). *See also* pp. 850-856, *supra.*

[284] *See* p. 856, *supra.*

The Applicant's witness James H. Miller urged that the refusal to deal was perhaps not stated so starkly as appears in Applicant's memoranda (DJ X 4,001, 4,006), and that the company was "under no illusions" about its obligation to serve AEC (Tr. 21, 572-21,574). We do not accept this attempted softening of the written words, based on the uncertain memory many years later of a witness whose interest and demeanor we observed on the witness stand. More importantly, if Applicant actually believed as it now contends that it was under a duty to sell wholesale power to AEC which the latter could use to compete for the Ft. Rucker load, the following written statement delivered in this context to Ft. Rucker authorities must be viewed as a deliberate misrepresentation:

> As stated above, the only power supply contract between Alabama Power Company and Alabama Electric Cooperative, Inc., is terminable on a 90-days' notice. Alabama Power Company is not requred to operate and maintain its system in such a manner as to enable Alabama Electric Cooperative, Inc., to take power under the contract referred to above and furnish service to Fort Rucker or any other customers served by Alabama Power Company nor is it required to operate and maintain its system so that Alabama Electric Cooperative, Inc., can achieve the same end by using such power to serve Fort Rucker or any other customers of Alabama Power Company through one of the distributing cooperatives served by Alabama Electric Cooperative, Inc. (DJ X 4,006, at p. 4).

Applicant seeks to excuse its conduct on the basis of its strong sense of grievance concerning the tax and lower interest advantages inhering in AEC and REA loans, and what it describes as the "callous attitude of REA" to limitations on the purpose of such loans (APP. Reply Br., pp. 841-842). However, these advantages given to cooperatives are the result of policy decisions by Congress, to whom actions seeking redress should be directed. Likewise, legal questions as to the scope and purpose of REA loans should be addressed to the courts, which Applicant did in its H-Loan litigation. We have held that such resort to the courts and attempts to influence legislative action are immunized from the antitrust laws. But this does not entitle Applicant to go further, and engage in a species of self-help which is contrary to the antitrust laws.

Under all of the circumstances, Applicant's conduct in this transaction constitutes unfair methods of competition proscribed by Section 5 of the Federal Trade Commission Act, and it is inconsistent with the antitrust laws and their clearly underlying policies.[285] Such course of conduct and the rationalizations used to justify it also have some bearing on the purpose and intent of Applicant in its other dealings with AEC as a potential competitor during the balance of the 1960's and the early 1970's.

---

[285] *See* pp. 845-848, *supra*

M. Applicant's Preclusion of Small Electric Utilities from Regional Economic Coordination and the Formation of the Southeastern Electric Reliability Council

The Department, AEC, MEUA and Staff assert that Applicant has precluded small electric utilities, including AEC and Municipal Distribution Systems in central and southern Alabama, from regional economic coordination (DJ PFF 16.01-16.10). They assert that Applicant, in concert with others, acted to deny such small utilities economic coordination during the period of development and formation of regional electric reliability councils in the mid and late 1960's.[286]

On November 9, 1965, a massive power blackout occurred in the northeastern United States. As a result, a number of regulatory agencies, members of Congress and the public expressed serious concern about the reliability of the nation's electric power supply (FPC *National Power Survey* Part I, Chapter 17, p. 2 and Note 1, December 1971). Following the blackout, a number of proposed legislative acts were introduced in Congress to provide for greater assurance of reliability and the supply of electric power by the nation's electric utility. Certain of these proposed legislative acts would have amended the Federal Power Act to give the FPC authority to compel economic coordination, including coordination development, among various electric utilities (Tr. 16,780; Tr. 16,175; 17,192; DJ 893; DJ 900, DJ 902; DJ 904; DJ R 7,075; Tr. 18,566-18,567). Many privately owned electric utilities were concerned that such legislation would result in government forced power pooling and economic coordination with smaller publicly owned electric systems, rather than leaving such matters to private business judgment (DJ 893; DJ 900; DJ 902; DJ 904; DJ 909; Tr. 18,566-18,567; Tr. 18,725-18,726). Consequently, such proposed legislation was opposed by the private utilities, including Applicant and it's affiliates in the Southern System (DJ 4,137-4,139; DJ 4,245-4,256; DJ 6,048;

[286] The Department originally sought to admit various documents (DJ 4,008; DJ 4,137-4,139; DJ 4,245-4,256; 5,001-5,002; 5,007-5,008; DJ 6048; DJ R 7,075; R 7,077-R 7,081; R 7,084) as unsponsored documentary evidence to establish Applicant's participation, in concert with others, in conduct designed to deny small utilities the benefits of regional coordination. The Department argued that these documents were relevant to the entire question of Applicant's conduct and policies concerning coordination with its small competitors in central and southern Alabama. The Board refused to admit these documents without sponsoring witnesses because of the seriousness of the anticompetitive charges which the Department was making (Tr. 15,066). Accordingly, the Board directed that the Department present witnesses in connection with the documents in order to adduce a more complete record with respect to Applicant's alleged conduct, in concert with others, in denying small utilities regional economic coordination (Tr. 15,066). Thereafter, the Department subpoenaed numerous witnesses who appeared and testified. The Board has evaluated the demeanor and credibility of all witnesses in reviewing the record evidence on the Department's charges in this matter. Our findings include, where appropriate, references to the demanor and credibility of several witnesses. Some we find credible; others incredible.

Tr. 18,421; 18,424; DJ 895-900; DJ 902; DJ 904; DJ 906-909; DJ 914; DJ 960). In the end, such legislation was not enacted by Congress. Instead, the nation's electric utilities formed coordinating organizations for the express purpose of improving reliability on a regional basis (FPC *National Power Survey*, Part I, Chapter 17, December 1971).

At the time of the 1965 power blackout, Applicant was a member of the Southern Company Pool, a highly sophisticated power pool which enables the operating companies of the Southern System to achieve substantial economies and benefits in the operation of their electric systems.[287] The pool includes only the operating companies of the Southern Company as it is a holding company pool. The Southern System had mutual agreements with neighboring electric utilities for exchanges of power, interconnections and reliability arrangements. Applicant, as a member of the Southern System, benefitted in these agreements (DJ 847; DJ 3,003-3,004; DJ 3,008; Tr. 15,937-15,938; Tr. 16,012-16,013; Tr. 16,188-16,189; Tr. 16,243-16,245; Tr. 17,398; Tr. 18,918-18,920; Tr. 18,834-18,836; Tr. 18,459).

In other parts of the southeast United States, other privately owned utilities had also formed power pools to achieve the benefits of coordination (DJ R 7,079; Tr. 16,515-16,516; Tr. 15,584; Tr. 16,130). The Carolinas-Virginia Power Pool (CARVA) was thus organized in 1964 and became operational in 1967. The pool consisted of Duke Power Company, South Carolina Electric and Gas Company, Carolina Power and Light Company and Virginia Electric and Power Company. The pool was dissolved in 1970 (Tr. 15,487; Tr. 18,035). The CARVA pool did not have any publicly owned utilities in its membership, although the South Carolina Public Service Authority (known as Santee-Cooper), a state-owned electric utility, did apply for admission to the pool in December 1965 (DJ 831; DJ R 7,079; DJ 15,518-15,519).

Elsewhere in the southeast, the Florida Operating Committee had been formed. This Committee was a voluntary organization whose participants were Florida Power Corp., Florida Power and Light Company; Tampa Electric Company; Orlando Utilities Department and Jacksonville Electric and Water Department. The latter two utilities were publicly owned and operated electric utilities. The Florida Operating Committee did not engage in the sale or exchange of power among its members. Such exchanges were made under individual contractual agreements among the Committee's members (Tr. 15,722-15,730).

In March 1965, Mr. William R. Brownlee, then Executive Vice President of Southern Services, the service company of the Southern Company and representing the Southern Pool, contacted the CARVA pool about the possibility of establishing interconnections and capacity and energy transactions. Mr. Brownlee also represented that the Southern Pool was interested in obtaining the

[287] *See* pp. 832-833, *supra* (Tr. 18,858; DJ 3,009).

benefits of economic coordination of generating unit additions and diversity power exchanges (DJ 803; Tr. 16,031; Tr. 17,322). The Southern System was interested in obtaining economically beneficial capacity and energy exchanges with neighboring utilities, as well as the benefits of coordinated planning and operation (DJ 803; Tr. 17,337). Mr. Brownlee reported to the Southern System at their July 16, 1965, meeting on the results of his communication with CARVA (DJ R 7,029A; DJ 17,341-17,344). In August 1965, Mr. Brownlee continued his efforts to obtain coordination with CARVA (DJ 821).

On March 3, 1966, representatives of CARVA, Florida Power Corp. and the Southern System met in Birmingham to explore the desirability of a more formal organization, or organizations, for expanding the benefits of coordination (DJ 5,001; DJ 5,001A, DJ R 7,079; Tr. 15,513). Representing the CARVA Pool were Mr. D.G. Jeter of South Carolina Electric and Gas Co. and Mr. L.P. Julien of Duke Power. Mr. M.F. Hebb, Jr. and Mr. R.E. Raymond represented Florida Power. Mr. G.L. Smith and Mr. R.O. Usry, of Southern Services, represented the Southern System. Mr. Smith chaired the meeting (DJ R 7,079; Tr. 16,065; 17,390; 17,395). Mr. Brownlee was unable to attend because of illness in his family (DJ R 7,079). Just prior to the March 3, 1966, meeting, Mr. Brownlee prepared a memorandum proposing the creation of the Southeast Power Coordination Committee which would consist of two representatives each from CARVA, Florida Power, and the Southern Pool. The purpose of the proposed organization was to formalize and expand the economic and reliability coordination which had been carried on informally for several years among the parties. The economic coordination which would be encompassed by the new organization included, but was not limited to, strengthening of interconnections, mutual emergency assistance, exchange of diversity capacity, staggering construction of generating capacity, short-term capacity and energy arrangements, exchanges of economy energy, and coordination of voltage levels, reactive power supply, and relay protection. Mr. Brownlee also proposed that the parties agree to exchange information with one another as it became available on such items as the magnitude and characteristics of actual and forecasted loads, approved programs of capacity additions, consideration of capacity additions before these are determined, opportunities for staggering of construction of capacity, and approximate value of economy energy under various conditions (DJ 847, Tr. 17,366-17,369, 17,426, 17,441, Tr. 18,918-18,920, Tr. 16,864-16,865). Mr. Brownlee gave his memorandum to Mr. Smith with the expectation that Mr. Smith would use Mr. Brownlee's suggested approach to obtaining expanded coordination in the March 3rd meeting (Tr. 18,919-18,920, 18,446-18,447). Mr. Smith went to the meeting in favor of the approach outlined in Mr. Brownlee's memorandum (Tr. 17,440-17,441, 17,421).

At the meeting, the possibility of participation by nonbusiness managed power utilities was recognized and discussed as a problem. It was noted that the

Municipal Systems of Orlando and Jacksonville, Florida, were a part of the Florida Operating Committee, but that there were no such public power systems included in the Southern System or the CARVA Pool. Concern was also expressed by the representatives of the Southern System that one or more municipalities or cooperatives in the Southern service area might seek economic coordination in such a more formal organization for coordination (Tr. 16,093-16,094; DJ R 7,079; Tr. 16,083; Tr. 17,442).

It was the consensus of those at the meeting that the Florida representatives to the more formal coordinating organization would not involve membership by the Florida Municipal Systems. The Florida representatives would achieve coordination with municipal systems among themselves, and would, in turn, coordinate the entire Florida group through the more formal organization. It was also noted that TVA would be unable to participate in coordinating arrangements with Florida Power and perhaps the CARVA Pool because of the 1959 Bond Act. The parties believed that the Southern System coordinating arrangements with TVA could be reflected in coordination with CARVA and Florida through bilateral arrangements (DJ R 7,079).

Mr. Brownlee's proposed formal organization was ultimately abandoned in favor of a series of bilateral agreements because of concerns that small public power systems in the CARVA, Florida and Southern service areas would or could become members of the more formal organization and would seek economic coordination with the privately owned utilities who were participants (Tr. 17,426, 17,442; Tr. 16,093-16,094; Tr. 16,083; DJ R 7,079, DJ 5,001, DJ 5,001A).

The representatives of the utilities at the March 3rd meeting explored various ways that a coordinating group or groups could be formed. The first method considered small coordinating groups of representatives of adjacent areas. For example, one coordinating group might be composed of Southern and Florida; another group composed of Southern and CARVA; and another of Southern, Middle South and TVA. The second method would be to establish a larger group or council to consist of members from CARVA, Florida and Southern. The third method would be to form coordinating groups as task forces under the southeast region of the Interconnected System Group. This approach would inherently encompass certain governmental organizations, but would not include a pool such as the Middle South group since that pool was located in the southwest region of the Interconnected Systems Group. The fourth method involved working through established committees of the Edison Electric Institute or the Southeastern Electric Exchange. It was noted that coordinating organizations tied to these entities would be subject to the challenge that the publicly owned utilities of Orlando and Jacksonville were not qualified to be members of the Edison Electric Institute or the Southeastern Electric Exchange. The final method suggested involved the formation of coordinating groups which

would work through the regions of the Federal Power Commission. However, it was suggested that this approach would probably destroy the benefits of genuine coordination. (DJ R 7,079) It was the feeling of the representatives at the meeting that the first suggested method would be the most desirable, and the various groups of pools could work internally with other utilities within their general area such as publicly owned electric systems (DJ R 7,079; Tr. 17,432-17,433).

The representatives also discussed the scope of the activities which would be carried out by the more formal organization on coordination. It was suggested that these activities include joint determination of future capacity additions and the possible staggering of construction of capacity, and coordination of transmission installations, both internal and interconnections. The suggestions also included coordination of maintenance or generating units, exploration of the need for better communications, especially in emergency conditions, coordination of relaying and load restoration procedures, utilization of daily spinning reserve, exploration of procedures for investigating major system troubles where two or more groups were involved, coordination of voltage level and reactive power supply, exchange of information with one another as it became available on items such as load forecasts, capacity additions, opportunities for staggering of construction of capacity, the value of economy energy under various conditions, and opportunities for strengthening interconnections. The representatives also considered coordination between groups or pools to be within the scope of the activities of the more formal coordinating organization. Those in attendance at the March 3rd meeting recognized that all of the above items were being coordinated to some degree among their respective companies, and it was possible that various committees of their respective companies, which were already internally active on these matters, could be utilized to effect the suggestions for coordination. The representatives at the meeting agreed to discuss these matters within their respective areas for further ideas and development, and to meet at a subsequent time for further discussions. The representatives of the Southern Companies furnished the other representatives at the meeting with certain information and were informed that similar information would be provided them by the other representatives (DJ R 7,079).

The record contains the draft minutes of the March 3, 1966, meeting (DJ R 7,079) which was prepared by Mr. R.O. Usry of Southern Services. Mr. Usry's draft minutes were circulated to the other representatives who attended the meeting for their review and comment. The final formal minutes were then prepared after consideration of the comments of the persons who had attended, and then distributed to the Chief Executives of the Operating Companies of the Southern System, to the CARVA Companies and to Florida Power (Tr. 17,385-17,387, 17,396-17,397, 17,399, 17,463-17,467; 15,542-15,544; 16,075; 16,168; 16,858, 16,882-16,883; 15,654-16,655; DJ R 7,079, DJ 5,001, DJ

5,001A, DJ 809, DJ 848-850). The Board finds that these draft minutes represent the most reliable and credible evidence of what actually transpired at the March 3, 1966, meeting. Mr. Usry prepared the draft minutes in a normal course of business, and was sent to the meeting for the specific purpose of taking notes. Mr. Usry has testified that the notes are accurate[288] (Tr. 16,882).

Following the March 3, 1966, meeting, Mr. Brownlee, on August 16, 1966, forwarded a preliminary draft of a proposed coordination agreement between the Southern System and the CARVA Pool to representatives of CARVA. Mr Brownlee notes in sending the agreements that they were intended to incorporate the ideas generated among the representatives attending the March 3, 1966, meeting, and to provide for the maximum feasible degree of coordination between Southern and CARVA The agreement is a bilateral arrangement between Southern and CARVA and encompasses economic coordination which had been discussed at the March 3, 1966, meeting as being within the scope of the activities of the more formal organization. Thus, Mr. Brownlee's draft described the duties of the Operating Committee to be formed under the bilateral agreement to include coordination of future capacity additions, and staggering of construction of capacity where mutually beneficial, and coordination of transmission, construction and protection arrangements to maximize system reliability (DJ R 7,078). The CARVA representatives, however, objected to Mr. Brownlee's draft as being too specific in its coordination provisions (DJ 828, DJ 827, R 7,078).

On February 7, 1967, Mr. Brownlee again contacted the representative for CARVA, and referred to the previous discussions between Southern and the CARVA Pool on the subject of coordination. Mr. Brownlee referred to the March 3, 1966, meeting as a basis for the proposed agreement and expressed a desire to implement the agreement as soon as possible (DJ R 7,080, R 7,078, DJ 821, DJ 803). On February 14, 1967, Mr. Franz W. Beyer, Vice President of Duke, invited representatives of the Southern System, Florida Power and the CARVA Companies to a meeting in Charlotte, North Carolina, at Duke's office on February 28, 1967, to discuss the advisability of entering into an agreement providing for coordination for reliability of their respective systems. Mr. Beyer suggested that the agreement be patterned after a recently signed East Central Area Reliability Coordination Agreement (ECAR) (DJ 840).

In response to Mr. Beyer's transmittal of the ECAR agreement to Southern, Mr. Smith again sent Mr. Beyer Mr. Brownlee's August 16, 1966, draft Southern-

[288] Mr. Brownlee attempted to explain away the substance of what is contained in the draft minutes of the March 3, 1966, meeting by stating that Mr. Usry was not "qualified" to take notes. We find this explanation absurd and an insult to the Board's intelligence. The record shows that Mr. Usry had attended numerous meetings of the Southern Company Operating Committee and served as the official notetaker at such meetings (Tr. 18,434; 18,437).

CARVA Agreement, along with the suggestion that Mr. Brownlee's draft also provide a basis for discussions in the February 28th meeting (DJ 830).

On February 28, 1967, Mr. Smith and Mr. Usry on behalf of Southern met with representatives of CARVA and Florida Power to continue discussions on a proposed coordination organization. Mr. Usry took notes of this meeting as did Mr. Beyer. These notes reveal that both Southern and Duke did not want publicly owned utilities such as municipalities and cooperatives to participate in any agreements involving economic coordination (DJ 5,002, pp. 4-5, R 7,077, p. 2). Thus, Mr. Smith, speaking for Southern, argued for a bilateral agreement containing economic coordination because of the problem of including publicly owned utilities in the agreement. Mr. Beyer, speaking for Duke, suggested a multilateral agreement dealing with reliability only, in order to present a better picture to regulatory bodies concerning overall reliability, and to avoid the problems of public power systems in the event they became parties to the agreement in the future (DJ 5,002, R 7,007, Tr. 18,123, Tr. 16,542-16,543, 16,548, 15,928-15,929). The discussions at this meeting clearly indicate that the parties wished to enter into agreement which would exclude publicly owned utilities, but could not agree on whether such an agreement shall be a multilateral agreement restricted to reliability as suggested by Duke, or a bilateral coordinating agreement as suggested by Southern. The notes of this meeting establish that the parties were concerned that publicly owned utilities might use the agreement as a forum for seeking economic coordination. In this regard, Mr. Smith revealed that Southern's legal counsel suggested that an agreement including economic coordination would act as a more effective deterrent against municipal or cooperative participation, whereas Mr. Beyer stated that CARVA's counsel had indicated that a reliability only type agreement would be less of an inducement and therefore a better detterent to municipal and cooperative participation (DJ 5,002, DJ R 7,078).

Mr. Smith suggested that only general statements about coordination be included in the agreement, but Mr. Beyer replied that such coordination was being done anyway in existing bilateral interconnection agreements among the parties, and that if the agreement under discussion reflected economic coordination, cooperatives and municipalities might desire to participate. Concern was also expressed that Santee-Cooper, Orlando Utilities Department, Jacksonville Electric and Water Department, and other small entities in the Southern System would obtain or seek economic coordination through any proposed agreement, and therefore the agreement should be drawn to be least likely to interest municipals and cooperatives (DJ 5,002, Tr. 16,144-16,147, Tr. 16,202, Tr. 16,321-16,323).

The record contains Mr. Usry's notes of the February 28, 1967, meeting (DJ 5,002) as well as Mr. Beyer's notes of the meeting (DJ R 7,077). The Board has examined each of these documents, and finds them to be reliable and credible

evidence of what actually took place at the February 28, 1967, meeting. The record shows that Mr. Usry prepared his documented notes from those which he actually took contemporaneously at the February 28, 1967, meeting. Mr Usry's notes were prepared in the regular course of business by him and were transmitted to Mr. Brownlee and Mr. Smith. They were labeled for internal use by the Southern System only. Moreover, Mr. Usry himself has testified that the notes which he took at this meeting, and as reflected in DJ 5,002, are accurate (Tr. 16,839-16,840, 16,845-16,847, 16,949, 16,963, 18,084-18,085, 18,135-18,136, 18,142).

Following this February 28th meeting, Mr. Brownlee and Mr. Smith met with CARVA representatives in Charlotte for further discussions. It became clear that there was a strong desire on the part of the CARVA companies to limit the proposed agreement to reliability only, but Mr. Brownlee and Mr. Smith argued for inclusion of economic coordination. In the end, it was agreed to limit the agreement to reliability (DJ 928, DJ 818, Tr. 18,147-18,148).

On April 28, 1967, the Southern System Operating Companies and Southern Services entered into a reliability agreement with the CARVA Companies. On December 1, 1967, the Southern System entered into a similar agreement with Florida Power. These agreements are known as bilateral or "rolling company-to-company," agreements (DJ 808; DJ R 7,084).

The Southern–CARVA Agreement is called a "Reliability Agreement," and eliminates most references to "coordination" as desired by the CARVA companies. The agreement, however, is bilateral as advocated by Southern. The Southern-Florida Power Agreement is substantially the same. These agreements were negotiated and executed without any invitation to, or participation by, publicly owned utilities, even though the electric systems of such utilities might have had an effect on the reliability of the electric systems of Southern and the CARVA companies, and Southern and Florida Power, which were already interconnected by reason of previously established agreements (Tr. 16,888; Tr. 18,073-18,074; 18,317-18,318; 15,759; 16,503-16,505; 16,468-16,469). But most significantly, these bilateral agreements have served as a basis for the parties to discuss various types of planning and coordination which were actually achieved through their existing interconnection agreements[289] (Tr. 15,606-15,610; Tr. 15,694; Tr. 16,122-16,123; 16,154; 16,162; 16,668; Tr. 18,161).

The evidence of the March 3, 1966, and February 28, 1967, meetings clearly establishes that the participants intended to engage in various forms of economic coordination among themselves, but through a means which would deter, discourage and even exclude smaller publicly owned utilities, such as municipal distributors, cooperatives, and state-owned entities, with whom they

[289] *See* discussions at pp. 828-831, *supra*.

competed, from such coordination[290] (DJ 5,002; DJ R 7,078). We find Applicant's conduct in this regard to be anticompetitive and inconsistent with the antitrust laws. A most revealing illustration of the attitude toward publicly owned utilities by the Southern System in this period is reflected in a letter dated February 7, 1966, addressed to Applicant's President, Mr. Walter Bouldin, from Mr. Harllee Branch, Jr., President of the Southern Company (AEC X 16). In the opening paragraph of Mr. Branch's letter, he stated:

> During the past year we have been increasingly concerned over the efforts of rural electric cooperatives to become full-fledged electric utilities seeking to serve all available markets (AEC X 16).

Mr. Bouldin went on to discuss various problems which the other operating companies of the Southern Systems were experiencing from such cooperatives. He then stated:

> It now becomes necessary to include much stronger contractual provisions which will prevent cooperatives from taking power sold to them at less than compensatory rates and using this power to compete with us for nonfarm and nonrural loads (AEC X 16).

The Board finds that Applicant's conduct with respect to deterring, discouraging and excluding publicly owned utilities from economic coordination in this matter is consistent with the anticompetitive attitude of the Southern System which is shown in Mr. Branch's letter. Applicant clearly intended to, and did, deny in concert with other utilities, publicly owned utilities in its service area the benefits of economic coordination in order to eliminate competition from them.

Applicant's intention to deny smaller utilities the benefits of economic coordination, however, did not stop here. It was manifested throughout the remaining late 1960's while the proposed legislation seeking to amend the Federal Power Act to allow the FPC to compel coordination was pending before

---

[290] Applicant asserts that Messrs. Brownlee, Smith and Usry only represented Southern Services at the March 3, 1966, and February 28, 1967, meetings, and therefore, Applicant cannot be held responsible for what took place (APP. PFF p. 28). The record shows, however, that Messrs. Brownlee, Smith and Usry wer authorized to conduct negotiations and prepare draft coordination agreements on behalf of the Southern Companies with other utilities (Tr. 17,287; 17,324-17,327; 17,372-17,374; 17,380-17,383; 17,523-17,524). Moreover, they kept the operating committee of the Southern Companies advised of such matters (DJ 803; DJ 848; DJ 850; DJ R 7,022A; DJ R 7,029A; Tr. 17,324-17,325). In any event the CARVA representatives at these meetings understood that the Southern Services representatives were there to speak for and represent the Southern Operating Companies (Tr. 15,509; 15,652-15,653; 15,915-15,916; Tr. 16,692, 16,694). The Board rejects Applicant's theory that it cannot be held responsible for the action of Messrs. Brownlee, Smith and Usry at these two meetings.

Congress. This proposed legislation was the subject of discussion at various Executive Committee Meetings of the Southern Company which were held from July 1967 to November 1969 (DJ 4,245-4,246).

At that time, there was no reliability organization established in the southeastern United States which included publicly owned utilities (DJ 869). The Chief Executives of the Southern Companies appointed a committee to review the need for such a reliability organization, and the committee, which included a representative of Applicant, met to discuss the matter on May 9, 1968. Applicant's representative at this meeting emphasized that Applicant:

> . . . would *not* be willing to take any action towards strengthening the reliability of service to AEC if such moves resulted in AEC being able to take over existing customers of Alabama [Power] (DJ 869). (Emphasis in original.)

The committee members also discussed the fact that the Operating Companies of the Southern System historically had dealt unilaterally with small utilities in their service areas in respect to all matters of power supply and service. Although the committee members recognized that a regional reliability organization, including these smaller utilities, could be created, it was the committee's consensus that the Operating Companies' unilateral approach should continue to be followed in discussing reliability with such utilities (DJ 867; 868; 869; Tr. 18,289-18,291; 18,294; Tr. 18,555; 18,582; 18,588-18,589). The committee's review of this subject did not end with this meeting.

The committee met again in July 1968. At that meeting, Applicant's representative expressed the fear that a general meeting of bulk power suppliers in the southeast could become a forum for demands by publicly owned utilities on matters unrelated to reliability. Consequently, the committee decided any reliability group should be structured so that matters of economic coordination would not be considered (DJ 872).

The committee's report was presented to the Executive Group of the Southern System Companies at a meeting held September 16-17, 1968. It was decided by the Executive Group to hold the matter of reliability organization in abeyance (DJ 873).

As noted above, the legislation introduced to effect coordination and reliability of electric systems was still pending in the Congress, even though by this time, several voluntary reliability organizations of utilities had been formed in various parts of the country (DJ 4,248-4,251). On May 9, 1969, Mr. Beyer of Duke Power wrote an internal memorandum to several members of his company's management committee who had responsibility for regional coordination matters (DJ R 7,075). Mr. Beyer's memorandum is most revealing.

Mr. Beyer stated that with the bilateral type of reliability agreements then in effect among private utilities in the Southeast, "each of the coordination areas

was in itself an economic entity." Because of these economic considerations, Mr. Beyer stated that "planning within each of the coordination areas necessarily includes economic considerations and therefore dictates against the admission of any publicly owned entity to coordination councils." Mr. Beyer further stated that publicly owned utilities such as the South Carolina Public Service Authority (Santee-Cooper) would not be interested in participating in a reliability agreement which left out economics as long as "proposed legislation contains provisions which intermix reliability with economics." Mr. Beyer then noted that the "same situation exists in other coordinated areas in the Southeast" (DJ R 7,075).

Mr. Beyer then suggested the formation of a southeastern regional reliability coordination area, encompassing the CARVA Companies, TVA, the Southern Companies and Florida Power. He further suggested that the purpose and scope of the regional proposal should be defined so as to allow representation of any entity in the area having bulk power facilities. Mr. Beyer significantly added:

> The existence of a reliability coordination agreement of this type would, I believe, be effective in combating the various proposals for reliability legislation by providing all entities access to planned councils and thereby removing reliability considerations as possible vehicles [sic] for economic concessions. This was our goal when we set out originally to organize the country into various coordinating areas. We were stymied because of the philosophy advocated by Mr. W. R. Brownlee, and I believe he would still object to the larger type organization (DJ R 7,075).

Mr. Beyer then suggested that Duke's President, Mr. W. B. McGuire, attempt to convince Southern Company's President, Mr. Alvin Vogtle, of the desirability of such a proposal. Mr. Beyer concluded his memorandum by stating:

> The various coordination groups now existing in the Southeast would become in reality economic entities within the larger organization. While there would undoubtedly still be pressure for admittance to CARVA by municipalities and by SCPSA, the excuse of membership to secure reliable service would no longer exist (DJ R 7,075).

The record shows that the reference in Mr. Beyer's memorandum to Mr. Brownlee's philosophy related to the bilateral approach to coordination embodied in Mr. Brownlee's draft bilateral agreement of August 16, 1966, between the Southern Companies and CARVA, which was sent to the CARVA companies and which was suggested by the Southern representative at the February 28, 1967, meeting. This type agreement calls for economic coordination, but excludes participation of public power systems (DJ R 7,078). Duke wanted the former but not the latter.

The suggestion contained in Mr. Beyer's memorandum for a regional reliability organization ultimately developed into the formation of what is

presently known as the Southeastern Electric Reliability Council (SERC). The Southern Companies agreed to the formation of such an organization, as long as the existing bilateral agreements encompassing coordination were maintained in effect (Tr. 16,682; 16,686; 16,691; 16,692; 16,694). SERC was formally established on January 14, 1970, by twenty-two electric power systems, including several municipals and cooperatively owned systems. AEC is a member. SERC deals only with reliability of electric systems. The existing bilateral agreements between the Southern System Companies and neighboring utilities remain in effect (AEC X 21; APP. X 235, DJ 3,003; DJ 3,008).

The Board finds on this record that Applicant intended to, and did, take steps to ensure that economic coordination matters were eliminated or separated from reliability consideration in order to avoid strengthening the position of publicly owned utilities such as AEC which competed with Applicant. Applicant's conduct in this regard is anticompetitive and inconsistent with the antitrust laws. Applicant's actions demonstrate a pattern of anticompetitive conduct which occurred throughout the 1960's into the early 1970's toward AEC. This anticompetitive conduct mandates that the Board grant relief in the form of placing conditions on the Farley licenses.

N. Other Anticompetitive Conduct

In dealing with a record as lengthy and complex as in this case, there are many subissues of fact and law which have been put forward by the parties but which are not in the mainstream of decisional significance. The Board has carefully considered all of the proposed findings of fact, conclusions of law, briefs and reply briefs filed by the parties. It would extend this decision and opinion unduly to allude to all such peripheral contentions. However, we note that such proferred issues included among others Applicant's alleged offers to purchase various distribution systems; its attempted acquisitions of certain transmission lines; and competition between Applicant and Covington Electric Cooperative to serve a new shopping center near the Town of Enterprise.

Any proposed findings of fact submitted by the parties, which are not incorporated directly or inferentially into this Initial Decision, are herewith rejected as being insupportable in fact or law or as being unnecessary to the rendering of this Decision.

IX. ACCESS TO NUCLEAR FACILITIES

The evidence in this case establishes that a situation inconsistent with the specified antitrust laws exists in Applicant's service area in central and southern Alabama. Applicant has achieved monopoly power over the generation and transmission of wholesale power in that market. That market dominance is

reinforced and enhanced by Applicant's participation in the Southern Company Pool, a highly sophisticated power pool utilizing a computerized central dispatching center and a comprehensive coordination of operation and development among the four companies which are the wholly owned subsidiaries of the Southern Company, a duly registered public utility holding company.[291] The operation of this pool, as a closely integrated power supply system, is clearly lawful under the Public Utility Holding Company Act, and it is not challenged as such by any of the parties.[292] However, such authorized activities do not immunize Applicant from antitrust scrutiny of its own conduct in its service area.

Applicant's attitude and course of conduct toward AEC changed in the 1960's, when the latter indicated that it intended to be a bulk power supplier rather than merely a wholesale customer of Applicant. This attitude is exemplified by the following portions of a letter dated September 7, 1966, to Walter Bouldin, President of Applicant, from Harllee Branch, Jr., President of the Southern Company:

> During the past year *we have been increasingly concerned over the efforts of rural electric cooperatives to become full-fledged electric utilities seeking to serve all available markets*. . . . It is also apparent that provisions incorporated in earlier contracts (when the co-ops were not asserting full utility status) are no longer adequate to afford the needed protection. . . . It now becomes necessary to include much stronger contractual provisions which will prevent cooperatives from taking power sold to them at less than compensatory rates and using this power to compete with us for nonfarm and nonrural loads. In late 1964 we concurred in the creation of your rate schedule and contract "R-2" for the long-term sale of power to cooperatives. Since that rate and contract does not provide adequate protection under today's conditions, it is requested that no quotations be made to cooperatives for service under this rate schedule without advance discussion with us so we can seek maximum consistency and uniformity throughout our service area (AEC X 16). (Emphasis supplied.)

Our foregoing analyses of Applicant's actions indicate that an anticompetitive pattern or course of conduct toward AEC developed when potential competition for the sale of wholesale power was discerned. The threatened refusals to deal with AEC for the sale of deficit power and other services have been described in the Ft. Rucker transaction. Applicant's unjustified delays or refusal to enter into a reasonable interconnection agreement even after its attempted legal challenges had been overruled by the courts, had an anticompetitive purpose and effect. This is true also of certain provisions and aspects of the

[291] DJ X 603-605; 1,002; 3,009; 3,014-3,015.
[292] 15 U.S.C. Section 79 *et seq.*; APP X JMF-73.

SEPA wheeling or transmission arrangements. And Applicant's conduct in the SERC transactions was part of the same pattern addressed by the Appeal Board in *Wolf Creek.*[293]

Having concluded that Applicant possesses monopoly power in the generation and transmission of electric power in the relevant market of central and southern Alabama, and that it has used its dominant position to hinder or foreclose competition or potential competition for wholesale power supply, we now come to the central purpose of this antitrust review. The Commission has recognized that Section 105c "reflects a basic Congressional concern over access to power produced by nuclear facilities," and a Congressional intent that "access to nuclear facilities be as widespread as possible" in order to prevent the original public control from developing into a private monopoly via the NRC licensing process.[294] The Declaration of the Atomic Energy Act of 1954, as amended, declares it to be the policy of the United States that "the development, use, and control of atomic energy shall be directed so as to . . . strengthen free competition in private enterprise."[295] Accordingly, under the circumstances reflected in the record in the instant case, AEC as an actual or potential competitor for wholesale power supply must be given reasonable access to the nuclear facilities at the present or future units of the Farley Plant.

AEC must also be given such access to Applicant's dominant transmission system as is necessary to enable it to make effective use of nuclear-generated power as a bulk power supplier. As the Appeal Board has stated, the activities under a license are not to be viewed in isolation. The operations of a nuclear plant are not to be considered in an airtight chamber or *in vacuo* in ascertaining a meaningful nexus between activities under a license and the situation inconsistent with the antitrust laws.[296] Here we have found that Applicant's activities, with regard to both generation and transmission, would maintain an anticompetitive situation "intertwined with or exacerbated by" the award of a license to construct or operate a nuclear facility.[297] Accordingly, reasonable access to both nuclear generation and transmission is required in order to prevent the maintenance of an anticompetitive situation.

[293] "It is far too late in the day to dispute that it runs counter to basic antitrust precepts to exercise monopoly power - however lawfully acquired initially - to foreclose competition or to gain competitive advantage, or to use dominance over a facility controlling market access to exclude competition and preserve a monopoly position. Electric utility companies are no more free than others to engage in those practices; their unjustified refusals to wheel power to or to interconnect with smaller entities in the field have regularly been called to account as violative of antitrust policies." *Kansas Gas and Electric Company et al.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 572 (1975).

[294] Waterford I and II, discussed at pp. 840-841, *supra.*

[295] 42 U.S.C. Section 2011. *See also* discussion at p. 838, *supra.*

[296] *Kansas Gas and Electric Company, et al.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 568, 572-573 (1975). *See also* discussion at pp. 841-843, *supra.*

[297] *Id.*, at 569.

The issues of nexus and access to nuclear facilities, which are interrelated, must be viewed in the context of the electric utility industry in the real world of today. The nation is in the midst of a profound and continuing energy crisis, with the cost and availability of all fuels the subject of serious concern. Oil and natural gas appear to be of declining significance for the generation of electricity, and hydroelectric capacity is now quite limited. Coal and nuclear power appear to be the chief sources of present and future energy requirements. Of these, nuclear power is still less expensive than coal, although its costs too continue to rise sharply.

If these factors are superimposed upon the existing monopoly situation, it is apparent that the Farley Plant's electricity is not merely commingled with other power generated by Applicant. These nuclear units represent an important new source of energy, at a time when the traditional sources of fuel for future use may well be unavailable or prohibitively expensive. They therefore are qualitatively different from mere increments in generating capacity, and they are essential to the viability of entities such as AEC. Under these circumstances, deliberately to withhold access to such essential nuclear facilities from a smaller competing entity would itself constitute anticompetitive conduct, with a clear nexus or connection between a situation inconsistent with the antitrust laws and the effect of reasonably probable activities under the license. We find that the exclusion of AEC from the Farley nuclear facilities probably would create a decisive competitive advantage to Applicant.

We now approach the question of the nature of access to nuclear facilities required in this case to obviate anticompetitive consequences of licensing. Since this is the first or liability phase of a bifurcated hearing, any conclusion expressed must be tentative or preliminary, simply offered to aid the parties in possible negotiations or to focus the issues for a remedy phase of hearings. As the legislative history discloses, the issue of fair access to nuclear facilities should be approached on a case-by-case basis, and could be satisfied by contractual arrangements for unit power as well as by ownership shares.[298]

Based upon evidence in the record describing the closely integrated operation of the large and complex Southern Company Pool, including coordinated planning and operation, we are dubious of the practicality of joint ownership.[299] Many decisions both immediate and long range depend upon a closeness of relationship and mutual trust and confidence which are difficult between active competitors under the best of circumstances. Given the long history of mutual antagonism and distrust between Applicant and AEC, such problems are intensified. Accordingly, our present tentative belief is that the

[298] Hearings, pt. 1, pp. 9-10. *See also* p. 839, *supra*.

[299] DJ X 603-609, 1,002, 3,009, 3,014-3,015; Tr. 1,397-1,401; 5,098; 5,115-5,117 (Mayben).

furnishing of unit power[300] by Applicant to AEC from the Farley Plant and future units, together with transmission or wheeling to enable AEC to make effective use of unit power as a wholesale supplier, would obviate the anticompetitive consequences of an unconditioned license.

No access to nuclear facilities as such appears to be required in the case of MEUA or its members. This result is based upon our finding that there is no significant actual or prospective competition between these entities at the retail distribution level.[301] We have also found that there is no "price squeeze" practiced by Applicant at the wholesale level, because its wholesale rates to MEUA customers have not been set too high, and Applicant is not serving its own retail customers at less than either long-run average or long-run incremental costs.[302] If AEC is granted reasonable access to nuclear facilities, presumably it could continue to be a competing wholesale power supplier. Therefore MEUA and its members would thereby have an alternative bulk power supply source. To go beyond this might be considered an unwarranted attempt to restructure the electric power industry at the retail distribution level, rather than fulfilling the statutory mandate of antitrust review under Section 105c.[303]

X. CONCLUSION

For the foregoing reasons, the Board has concluded that it is reasonably probable that the Applicant's activities under the Farley Plant's license would maintain a situation inconsistent with the specified antitrust laws. Accordingly, it will be necessary to attach conditions to the license which will prevent such a result. Since this is a bifurcated hearing in which the issue of liability was covered in the first phase of the proceeding, it will be necessary to continue to the second phase in order that the aspects of appropriate remedies may be considered.

In the meantime, the parties are urged to adopt the procedure recommended by the Court in a somewhat similar situation. In *United States* v. *Terminal Railroad Association of St. Louis,* 224 U.S. 383, 411-412 (1912), where it was held that a certain contract constituted a proscribed restraint of trade, the court remanded the case with directions that a decree be entered directing the parties to submit to the lower court within a time certain a plan for the reorganization of the contractual arrangements. Upon the failure of the

---

[300] We note that the license conditions proposed by the Department would require Applicant to grant equal participation (ownership or unit power purchase) in both Farley units and all future nuclear units installed by Applicant. See p. 815, *supra.*

[301] *See* pp. 887-890, *supra.*

[302] *See* p. 939, *supra.*

[303] *See* p. 840, *supra.*

parties to come to an agreement which was in substantial accord with the opinion, the lower court would, after holding a hearing, enter such an order or decree as might be required.

In this case, capable and experienced counsel have addressed themselves to its complexities over a period of years. It is noted that during closing argument, counsel for the Applicant stated that it had never denied AEC access to nuclear generated power or to transmission and that it remained willing to provide such access (Tr. Oral Argument, November 22, 1976, pp. 120, 172-173). We therefore urge counsel immediately to commence negotiations for the purpose of agreeing to proposed license conditions consistent with our decision and opinion in phase one of this proceeding. Such proposed license conditions should encompass the Applicant providing AEC with reasonable access to nuclear generated power on a unit power basis, and with access to wheeling or transmission on reasonable terms and conditions in such a manner as to enable AEC to make effective use of its share of the nuclear generated power as a wholesale power supplier. Some consideration also should be given to the appropriate supply of bulk power when there is an outage at the nuclear facilities for any reason.

Counsel are directed to report to the Board in writing by April 22, 1977, whether they have been successful in negotiating the terms of proposed license conditions consistent with this opinion, or whether there is a reasonable likelihood of arriving at an expeditious agreement. If no agreement is possible, a hearing on the remedy phase of this proceeding shall commence at 10:00 A.M. on May 9, 1977, at the Commissions's Hearing Room, 5th Floor, 4350 East West Highway, Bethesda, Maryland 20014. We are mindful that Applicant has pledged not to seek a stay of any adverse decision of the Board in this first phase, and we expect that further proceedings will be conducted without any unnecessary delay (Tr. 502-503).

XI. ORDER

IT IS ORDERED, in accordance with the Atomic Energy Act of 1954, as amended, and the rules and regulations of the Nuclear Regulatory Commission in accordance with Sections 2.760, 2.762, 2.764, 2.785 and 2.786 that this Initial Decision shall become effective immediately and shall constitute, with respect to the matters covered herein, the final action of the Commission forty-five (45) days after issuance hereof, subject to any review pursuant to the above referenced rules. Exceptions to this Initial Decision may be filed by any party within seven (7) days after service of this Initial Decision. A brief in support of the exceptions must be filed within fifteen (15) days thereafter [twenty (20) days in the case of the NRC Staff]. Within fifteen (15) days of the filing and service of the brief by the Appellant [twenty (20) days in the case of the NRC Staff], any party filing such exceptions shall file a brief in support thereof.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller, Member
Dr. Kenneth G. Elzinga, Member
Michael L. Glaser, Chairman

Dated at Bethesda, Maryland
this 8th day of April 1977.

APPENDIX E

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Michael L. Glaser, Chairman
Marshall E. Miller
Kenneth G. Elzinga

In the Matter of

Docket Nos. 50-348A
50-364A

ALABAMA POWER COMPANY
(Joseph M. Farley Nuclear Plant,
Units 1 and 2)

June 24, 1977

I. PRELIMINARY STATEMENT

This proceeding arises under Section 105c of the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2135(c). On April 8, 1977, this Atomic Safety and Licensing Board (Board) issued an Initial Decision (5 NRC 804) in the first phase of this proceeding, which concluded that the activities under the licenses for the Joseph M. Farley Nuclear Plant, Units 1 and 2, would maintain a situation inconsistent with the antitrust laws and the policies underlying those laws. This Board further concluded that certain relief was necessary and indicated that additional proceedings were required to determine the exact nature of the relief.

Earlier in this proceeding we had granted the motion of Alabama Power Company (Applicant) to divide this proceeding into two phases. At that time we ordered the first phase to be directed toward a determination of whether the activities under the licenses would create or maintain a situation inconsistent with the antitrust laws. In the event such inconsistency was found, we ordered that a second evidentiary phase be held to determine the appropriate relief in terms of conditions to be placed on the licenses for the Farley Nuclear Plant. As noted above, in our Initial Decision, we held it reasonably probable that Applicant's activities under the licenses for the Farley Nuclear Plant would maintain a situation inconsistent with the antitrust laws, and that it was, therefore, neces-

sary to attach conditions to the licenses in order to prevent such a result. We further stated in the Initial Decision that since this proceeding had been bifurcated and the issue of inconsistency was ventilated in the first phase, it was necessary to continue the second phase to consider the appropriate remedy.

Our Initial Decision stated, as the legislative history of Section 105c of the Act disclosed, that the issue of fair access to nuclear facilities to obviate anticompetitive consequences of licensing should be approached on a case-by-case basis, and could be satisfied by several means, including contractual arrangements for unit power or ownership shares.[1] Since our Initial Decision dealt only with the first or liability phase, we stated that any conclusions the Board expressed in the Initial Decision concerning the appropriate remedy were necessarily preliminary or tentative, offered simply to aid the parties in possible negotiations or to focus on the issues for consideration in the remedy phase of hearings.[2] We stated that our tentative belief was that the furnishing of unit power by Applicant to Intervenor Alabama Electric Cooperative (AEC) from the Farley Plant and future units, together with such transmission or wheeling services as are necessary to enable AEC to make effective use of nuclear-generated power as a wholesale supplier in central and southern Alabama, would obviate anticompetitive consequences of unconditioned licenses for the Farley Plant.[3] Although we expressed this tentative view regarding relief, we determined that no access to the Farley Plant was required in the case of Intervenor Municipal Electric Utility Association of Alabama (MEUA) or its members, because of our finding on the basis of evidence of record that there was no significant actual or prospective competition between Applicant and these entities at the retail distribution level, nor other conduct of Applicant toward MEUA or its members which was inconsistent with the antitrust laws within the meaning of Section 105c of the Atomic Energy Act.[4] We concluded that if access to nuclear facilities were granted to MEUA in the face of our findings of no significant actual or prospective competition at the retail distribution level, and of no other anticompetitive conduct of Applicant toward MEUA, such a ruling might be considered an unwarranted attempt to restructure the electric power industry at the retail level, rather than fulfilling the statutory mandate of antitrust review under Section 105c.[5]

[1] Initial Decision (Antitrust) (5 NRC at 960 (April 8, 1977)).

[2] *Id.* at p. 960

[3] *Id.* at pp. 959, 960-961.

[4] *Id.* at p. 961.

[5] MEUA attempted to participate in the second phase of this proceeding by seeking to offer evidence that MEUA and its members were prospective competitors of Applicant in the wholesale market, which we found was the relevant market for purposes of this antitrust review. The Board ruled that MEUA could not participate in the second phase on grounds that our findings as to MEUA in the first phase were controlling and that the purpose of phase two was to fashion a remedy consistent with our findings in the first phase. (Tr. 27,189)

Before actually commencing the second phase of this proceeding, however, we urged the parties to adopt the procedure recommended by the Supreme Court in a somewhat similar situation as appeared in *United States* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383, 411-412 (1912), where the Supreme Court remanded the case with directions that a decree be entered directing the parties to submit to the lower Federal court within a time certain a plan for reorganization of certain contractual arrangements which had been found in restraint of trade. Upon the failure of the parties to reach an agreement which was in substantial accord with the Supreme Court's opinion, the lower court would, after holding a hearing, enter such order or decree as might be required. We further directed the parties to report to us in writing through their counsel by April 22, 1977, whether they had been successful in negotiating the terms of proposed license conditions consistent with our Initial Decision, or whether there was a reasonable likelihood of arriving at an expeditious agreement. If no agreement were possible, we ordered that a hearing on the second or remedy phase of this proceeding would commence on May 9, 1977.[6]

On April 22, 1977, the Board was informed by all parties that no agreement had been made, and that it was reasonably unlikely that such agreement would be reached. Accordingly, we issued a Notice of Resumption of Antitrust Evidentiary Hearings (Remedy Phase, License Conditions) on April 27, 1977, establishing May 9, 1977, as the date for commencement of evidentiary hearings to determine the exact nature of the relief to be imposed in the form of conditions to be attached to the licenses for the Farley Nuclear Plant.

Evidentiary hearings commenced on May 9, 1977, in Charlottesville, Virginia, and continued until May 17, 1977, when the record was closed. We directed the parties to file proposed findings of fact, conclusions of law, and briefs by May 27, 1977. Pursuant to the suggestion of the parties,[7] we dispensed with the filing of replies. All parties filed their proposed findings, conclusions and briefs on the specified date. The Board has given careful consideration to the record developed in this second phase, to the relevant evidence previously included in the record during the first phase, as well as to the findings and briefs of the parties. Before we approach that aspect of this decision on the remedy to be imposed in the form of license conditions, we believe it will be helpful to discuss the purpose of the second phase in this proceeding, and how our Initial Decision, in the first phase, is significantly related to the relief we have decided is appropriate.

II. PURPOSE OF PHASE II

The purpose of Phase II of this proceeding is to fashion a remedy in the

[6] *Id.* at pp. 961-962.

[7] Tr. 28,391.

form of conditions to be attached to the licenses for the Farley Plant, consistent with the Board's findings in the first phase, that the activities under the Farley Plant licenses would maintain a situation inconsistent with the specified antitrust laws and the policies underlying those laws. After such findings have been made under Section 105c(5), the relevant statute, Section 105c(6), provides:

> (6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate. (Section 105c(6), of the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2135(c)(6).)

The Report by the Joint Committee on Atomic Energy on the 1970 amendments to the Atomic Energy Act describes our responsibility under Section 105c(6) as follows:

> While the Commission has the *flexibility* to consider and weigh the various interests and objectives which may be involved, the committee does not expect that an affirmative finding under paragraph (5) would normally need to be overridden by Commission findings and actions under paragraph (6). The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to *eliminate the concerns* entailed in any affirmative finding under paragraph (5) while, at the same time, *accommodating* the *other public interest concerns* found pursuant to paragraph (6). Normally the committee expects the Commission's actions under paragraphs (5) and (6) will *harmonize* both *antitrust* and *such other public interest considerations* as may be *involved.* (Emphasis supplied) [H.R. Rep. No. 91-1470, reprinted in U.S. Code Cong. Serv. 5011-12 (1970).]

> The Appeal Board has also observed that:
> Section 105c(6) simply directs the Commission to place "appropriate" conditions on licenses where necessary to rectify anticompetitive situations. This is an invocation of the Commission's discretion, not a limitation on its powers.[8]

It thus appears that in fashioning remedies by means of license conditions, the Board is to exercise an informed discretion to discern and identify both antitrust

[8] *Kansas Gas & Electric Co. and Kansas City Power and Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 571 (1975).

concerns and other public interest considerations, and to harmonize and accommodate those various interests and objectives. This suggests that a careful analysis must be made on a *case-by-case* basis to determine the appropriateness of requiring license conditions. Since the remedy should address the malady, there is no simple panacea by the attempted imposition of all-purpose, standardized license conditions which seek to treat alike varied market situations involving nuclear facilities.

Since rather broad license conditions have been proposed in this proceeding by the Department of Justice (Department) and the NRC Staff (Applicant's Exhibit 1, Phase II), and to a somewhat lesser degree by AEC, we believe it is necessary to delineate the nature and extent of the anticompetitive situation we found in our Initial Decision. This analysis is not merely an attempt to catalog various actions and conduct of Applicant in order to frame conditions directed against specific actions. Rather, it is an effort to describe that kind of situation which could reasonably arouse antitrust "concerns entailed in any affirmative finding under paragraph (5)" (Joint Committee Report, *supra.*, p. 5011). It would be pointless to draft license conditions directed toward those aspects of a market situation which the Board has found do not involve proscribed anticompetitive conduct.

Indeed, the Department, the Staff and AEC have previously recognized the interrelationship between alleged anticompetitive conduct and appropriate remedies. In opposing bifurcation of this proceeding, these parties stated that:

> . . . since, in this complex industry, the inconsistency is not always obvious, it must be shown by contrasting the proper behavior with the existing behavior. Compelling conduct paralleling competitive behavior is the remedy. . . . Accordingly, the inconsistency and the remedy are inextricably intertwined because the same evidence will prove the inconsistency and also suggest the remedy.[9]

Logically, it must follow that where the evidence does not prove inconsistency with the antitrust laws, no license condition is appropriate as to that aspect of the market situation. For example, these parties urged that:

> Central to the existing inconsistency is the fact that small systems in Alabama are not presently accorded access to the "regional power exchange market"—the market in which certain of the factors of production of a competitive bulk power supply are bought and sold.[10]

---

[9] Response of the Department of Justice, AEC Regulatory Staff and the Intervenors Opposing Applicant's Motion to Bifurcate the Hearing, filed May 6, 1974, at p. 4.

[10] *Id.*, at p. 2.

Since the Board rejected this proffered "regional power exchange market,"[11] a remedy granting access to the nuclear facilities in question which is based upon this concept would likewise be inappropriate.

In order to keep the proposed remedies in the form of license conditions consistent with our findings as to Applicant's liability in the first phase, it may be useful at the outset to consider what aspects of the situation were found not to be inconsistent with the antitrust laws. The various types of coordination for economy and reliability which Applicant obtained as a member of the Southern Company pool were found not to be anticompetitive. This pool formed by the operating companies of a valid electric utility holding company is legal, and cannot be analogized with a pool formed by some competitors which excludes other competitors for anticompetitive reasons, as in the case of a "bottleneck monopoly." It would not be appropriate to require license conditions admitting AEC to membership in this holding company pool, nor to achieve the same result indirectly by conditions "compelling conduct which parallels" the so-called competitive conduct in the "regional power exchange market."[12]

Applicant's opposition to AEC obtaining REA loans for the construction of new generation and transmission lines, on the grounds of wasteful and unnecessary duplication of facilities contrary to the purpose of the statute and the public interest, was held not to be inconsistent with the antitrust laws. The issues were reasonably open to dispute, and the use of administrative and judicial fora was appropriate under the circumstances.[13]

We found that various wholesale rate reductions by Applicant were made for legitimate business reasons, and were not made to forestall self-generation by AEC. In fact, the REA at times encouraged Applicant to offer lower wholesale rates, to which it responded in good faith.[14]

There was no evidence that Applicant refused to deal with AEC in providing emergency maintenance service in the mid 1950's, and it was quite willing to negotiate a special rate for emergency and maintenance service during periods of routine inspection of equipment.[15] However, after the Federal courts ruled in

---

[11] Initial Decision, 5 NRC at 886-887.

[12] Responses to Bifurcation Motion, *supra.*, at pp. 4-5. At one time, the Department argued that access to the Farley units could take one of several forms, which for illustration were described as ownership participation, unit power, and "A third method could be to add, on request, third party systems to the Southern Company pool." Compulsory membership in this pool is neither reasonable nor realistic under the facts in the record, and probably does not represent the current position of the Department or the other parties. *See* Statement of Legal Theory and Supporting Facts of the Department of Justice, p. 13 (September 11, 1972).

[13] Initial Decision, 5 NRC at 902-908.

[14] *Id.*, pp. 908-913.

[15] *Id.*, pp. 913-916 .

1968 that AEC's thirty-five-year all-requirements contracts with its members were valid, Applicant consistently refused until 1972 to offer fair interconnection and coordination arrangements with AEC, with the purpose of maintaining and protecting Applicant's wholesale customer business from competition with AEC. Applicant's conduct was found to be anticompetitive in these circumstances.[16]

Although the Board found that Applicant acted inconsistently with the antitrust laws in refusing to offer AEC fair coordination from the time of the Federal court decisions in 1968 affirming the validity of AEC's thirty-five-year all-requirements contracts until February 1972, when an Interconnection Agreement between Applicant and AEC was entered into, we specifically held that the agreement in and of itself did not deny AEC access to power exchange or coordinating services in an anticompetitive manner.[17] We did observe, however, that the "protective capacity" provision in the Interconnection Agreement which specified AEC's reserve obligation was an unusual one, and should be eliminated. Accordingly, the Board indicated it would require Applicant and AEC to redefine AEC's reserve obligation on a different basis in the future, but left it up to the parties to decide how best to state the obligation of sharing their reserves.[18]

The Board found no evidence that Applicant had denied AEC and MEUA ownership participation in the Farley Plant.[19] Likewise, we found no basis for holding that Applicant refused to consider coordination with a generating plant proposed to be constructed by the City of Dothan, Alabama.[20] We also rejected the contention that Applicant inserted contractual provisions in its various agreements with AEC and municipal systems in order to prevent competing self-generation and transmission, but we found that such provisions were anticompetitive because they had the effect of precluding alternative sources of wholesale power.[21]

The Board was unable to find that Applicant opposed construction by the Southeastern Power Administration (SEPA) of high voltage transmission lines for anticompetitive reasons.[22] We did hold that Section 4.2 in the 1970 agreement between Applicant and SEPA, which provided that unless a preference customer purchases all of its supplemental power (that is, power needed over and above the SEPA allotment and power generated by such a customer's own resources) from Applicant, the company is not obligated to wheel SEPA power

---

[16] *Id.*, pp. 916-925.
[17] *Id.*, pp. 925-928.
[18] *Id.*, p. 928.
[19] *Id.*, pp. 928-929.
[20] *Id.*, pp. 930-931.
[21] *Id.*, pp. 931-932.
[22] *Id.*, pp. 932-933.

to the preference customer, was tantamount to an exclusive dealing arrangement inconsistent with the antitrust laws.[23]

The Board found no "price squeeze" practiced by Applicant at the wholesale level, as alleged by MEUA.[24] We also determined that Applicant did not misuse judicial and administrative processes against AEC to prevent its acquisition and expansion of generation and transmission, and that Applicant's resort to the courts and administrative agencies was wholly appropriate and constitutionally protected under the Noerr-Pennington doctrine. We found no pattern of baseless claims nor repetitive law suits bearing the hallmark of insubstantial claims in connection with such judicial and administrative processes.[25]

Finally, the Board rejected as unsupported in fact or law a multitude of other proferred allegations of Applicant's anticompetitive conduct such as offers to purchase various distribution systems, attempted acquisition of certain transmission lines, and efforts to serve a new shopping center near Enterprise, Alabama.[26]

The Board did find that Applicant's conduct in respect to AEC's efforts to bid competitively for the supply of wholesale power to Ft. Rucker, Alabama, constituted an unfair method of competition proscribed by Section 5 of the Federal Trade Commission Act, and that such conduct was inconsistent with the antitrust laws and their underlying policies.[27]

We also found that Applicant, in concert with others, had acted to preclude small electric utilities in central and southern Alabama from obtaining the benefits of economic coordination during the period of the development and formation of regional electric reliability councils in the mid and late 1960's.[28]

Thus, in our Initial Decision, we found but five instances of conduct on the part of Applicant which can be termed inconsistent with the antitrust laws. These instances began in the early 1960's with the Ft. Rucker transaction, continued through the period of the mid and late 1960's in connection with the development and formation of regional electric reliability councils and in regard to negotiations with AEC for an interconnection agreement, and were also manifested in Section 4.2 of Applicant's 1970 agreement with SEPA, as well as in certain agreements with AEC and municipal distributors. We found no evidence that indicated conduct on the part of Applicant which is inconsistent with the antitrust laws beyond early 1972. In fact, the record before us shows that, in at

---

[23] *Id.*, pp. 933-937. This provision has now been removed from the agreement between SEPA and Applicant as of June 1, 1976. *See* Tr. 28, 316-28, 319.

[24] *Id.*, at pp. 937-940.

[25] *Id.*, at pp. 940-942.

[26] *Id.*, at p. 957.

[27] *Id.*, at pp. 942-945.

[28] *Id.*, at pp. 946-957.

least one instance, Applicant is engaging in significant and benefical coordination of transmission lines with AEC.[29]

Accordingly, we held it reasonably probable that Applicant's activities under the licenses for the Farley Nuclear Plant would maintain a situation inconsistent with the antitrust laws on the basis of the five instances of conduct inconsistent with the antitrust laws and determined that AEC must be given reasonable access to these nuclear facilities.

Our task in this phase, therefore, is to fashion conditions attached to the licenses for the Farley Plant which would prevent the maintenance of the anticompetitive situation by Applicant in central and southern Alabama, the market relevant for the antitrust review. These conditions clearly must be established in the context of our findings in Phase I of this proceeding and should not address the situation as if all of the numerous rejected allegations of anticompetitive conduct on the part of Applicant had been proven.

III. ACCESS TO NUCLEAR GENERATION

The Department, Staff and AEC submit that AEC should have the unilateral option to choose among wholesale power purchases, unit power purchase, and ownership participation if AEC is to be afforded reasonable access to nuclear power. These parties have proposed broad license conditions which encompass such an option (Applicant Exhibit No. 1, Phase II). AEC further contends that the option of ownership participation in the Farley units, which option AEC intends to exercise, is the only appropriate form of access in this case.

Applicant contends that access to Farley generation on the basis of unit power is reasonable and adequate because it would enable AEC to obtain power for its use in competing in the wholesale-for-resale market in central and southern Alabama on the same unit cost as would be available to Applicant for purposes of competing in the same market. It raises numerous objections to the imposition of ownership participation in this case, and urges that joint ownership was never intended to be the sole method of providing reasonable access to nuclear facilities. Applicant has submitted a proposal (APP II-2) which it contends offers unit power on a proportionate basis and insures that such power will be available for the life of the Farley Plant. Applicant further asserts that wholesale power sales, with the assumed low costs of the Farley power included in the fully allocated costs of power, is another reasonable form of participation in these nuclear facilities.

A. Legislative History

The question of what constitutes reasonable access to nuclear facilities runs

[29] Tr. 28,060.

through the hearings of the Joint Committee, which drafted the 1970 amendments of Section 105c. Intertwined with this issue is the approach to be taken in dealing with the licensing of nuclear plants which are the products of joint ventures by some competitors which exclude other competitors on the one hand, and those which are constructed by a single entity to serve its own needs on the other. These troublesome questions were not explicitly resolved by the provisions of Section 105c(6), but the Commission was given flexibility to consider and weigh the *various* interests and objectives which might be involved after a finding of inconsistency under Section 105c(5). A consideration of the legislative history may be helpful in discerning the Congressional intent.

In 1968, Donald F. Turner, Assistant Attorney General, discussed these matters in an exchange with Representative Hosmer as follows:

> [Mr. Turner] We are not suggesting that the only form of access should be by ownership participation. It may well, indeed, be access to the power on the purchasing basis.
>
> There may well be situations in which, for one good reason or another, it would not be feasible to permit a system to participate on an ownership basis, but it still may be perfectly feasible to give them access by purchase.
>
> [Representative Hosmer] You state that you support the principle that participation in a large scale nuclear project should be available to all to a fair and reasonable extent.
>
> Again, are you talking about ownership as well as assured supply of electricity at a fair rate, or are you talking about both?
>
> [Mr. Turner] Either or both. We are not suggesting that, as I said earlier, that access on an ownership basis must necessarily be given.
>
> [Representative Hosmer] Your objective is to protect the smaller companies, public or private, as to availability of power at reasonable cost, and you did not say that in order to do this, such utilities must have an equity in the generation plant?
>
> [Mr. Turner] That is correct.
>
> [Representative Hosmer] It can be done by the requirement that the market be furnished at rates which somebody determines are reasonable?
>
> [Mr. Turner] That is correct.
>
> [Representative Hosmer] All right. (Hearings on Participation by Small Electrical Utilities in Nuclear Power, Pt. 1 at 62 (1968).)

In 1968, Chairman Seaborg of the AEC stated in a letter to the Executive Director of the Joint Committee that "in many cases an equitable sharing of benefits could be obtained by means other than ownership participation." (1968 Hearings, *supra.*, p. 17)

These matters were also discussed by Roland W. Donnem, Director of Policy Planning, Antitrust Division, Department of Justice, in a widely quoted address to the Federal Bar Association on October 15, 1969. Mr. Donnem's views were subsequently included in the report of hearings by the Joint Committee, and they were expressly stated by the Department to be "the views of the Antitrust Division." (Hearings Pt. 1, pp. 7-12, 118) Mr. Donnem stated:

> Thus, the conclusion that all sectors of the electric utility industry should have adequate access to low cost power is, I think, compelled by the policy of the antitrust laws. When competitors have no reasonable alternative method to participate in similar large scale arrangements, they must be permitted fair participation in the plant under consideration. But there remains the question of what constitutes fair access in any given situation. Participation may be afforded by ownership shares, or by contract, or by a combination of the two.
>
> Whatever participation device is employed, two basic principles should be observed. First, the small and municipally owned companies must be afforded the same opportunity to receive the low cost power for the same uses as the larger participating systems. For example, if the larger participants use the low cost power for existing requirements, then it must be available to all for that use. If the power is to be used for growth, then each of the competitors must have the opportunity to obtain the power for that use. Only in this way are the competitive opportunities equalized and decisive competitive advantage avoided.
>
> Second, it may well be necessary in some circumstances to make explicit allowance for the competitive advantage conferred on municipally owned companies by virtue of their tax exempt status. Failure to make such allowance might confer an unfair competitive advantage on municipally owned companies who are permitted to participate, and thus hamper competition and perhaps discourage the very creation of large scale generating facilities. (Hearings Pt. 1, p. 10.)

In supporting the passage of the 1970 amendments to Section 105c, Walter B. Comegys, Acting Assistant Attorney General, Antitrust Division of the Department, testified:

> Specifically, the industry is now going through a considerable controversy over the extent to which, and the means by which, small systems should

have access to large new generation and transmission facilities. As to this, I think the antitrust law provides some general guidance. Companies acting together to create or control a unique facility may be required by application of the rules of reason, to grant access on equal and nondiscriminatory terms to others who lack a practical alternative. (Citing the *Terminal Railroad, Associated Press, Gamco* and *Silver* cases discussed in our Initial Decision.) We have not wished to take the position that where competitive policies require that smaller firms have access to a large low cost power facility the access must always be furnished by ownership share in the new plant. Nor have we wished to assert that it will always be acceptable to have contracts for the sale of power from the plant. Either position would, in our opinion, unduly limit members of the industry in working out the most expeditious, fair, and efficient means of creating new facilities and sharing in their benefits. It may be that in some circumstances ownership share is required, as the Vermont Commission has recently decided with respect to the nuclear joint venture in Vermont. In other cases, contractual arrangements may be entirely adequate. In this connection, we have not been able to endorse the suggestion that it will invariably be satisfactory for contractual arrangements to provide for the sale of power at the average cost of the selling utility. In some circumstances, this might impose a substantial competitive disadvantage on the company buying the power. We do think that adequate access implies the same opportunity to receive low cost power for the same uses as those who have the unique low cost facility. (Hearings, Pt. 1, p. 128.)

Similar views were expressed by Mr. Comegys when he appeared before the Senate Subcommittee on Antitrust and Monopoly to testify in hearings concerning the Competitive Aspects of the Energy Industry. In explaining the Department's position on the pending amendments to Section 105c, he stated:

We do not consider such a licensing proceeding as an appropriate forum for wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review.

The principal problem area we foresee is that of access to a plant's output by outside utilities, public and private. To obtain the economies of scale possible under atomic generation, plants must be both very large and very expensive, in most cases too much so for one company to finance or to use wholly in its own system. Accordingly, most plants are organized as joint ventures among several utilities. At the same time, the reduction in marginal cost of power afforded by an atomic plant is so great that a competing utility, denied participation and without an alternative means of acquiring such benefits, is placed at a competitive disadvantage. . . .

> The mode and terms of access must, of course, depend on the particular factual context surrounding each individual licensing application.
>
> Under some circumstances, an ownership share may be required for an outside utility who desires to assume the risks as well as the benefits. In other cases, contractual arrangements for a portion of the plant's output may be entirely adequate. . . . (Record of Hearings before the Subcommittee on Antitrust and Monopoly pursuant to Senate Res. 334, Pt. 1, p. 142.)

The Joint Committee posed certain written questions to the Department regarding the form of fair access. One question asked, "In your opinion, would favorable wholesale rates which reflect a fair share of the costs of generation from new efficient units constitute 'fair access' to such low cost generation?" Richard W. McLaren, Assistant Attorney General, Antitrust Division, responded as follows:

> If the "fair share of costs from new efficient units" resulted in wholesale rates which did not disadvantage the purchaser vis-a-vis the supplier, such rates would provide "fair access". . . . (Hearings, Pt. 1, p. 147.)

The Atomic Energy Commission (now Nuclear Regulatory Commission) adopted similar positions before the Joint Committee. When asked to comment on Mr. Donnem's speech, *supra.*, Commissioner James T. Ramey stated in a letter dated February 4, 1970:

> The speech does not draw a clear distinction between single-owner units and multi-owner (joint venture) units as regards the categories of antitrust issues which may be involved and the actions which might be required to resolve them satisfactorily. Mr. Comegys in his testimony appeared to recognize that a multi-owner situation would present antitrust considerations different than those involved in a single-owner case. . . . With respect to Mr. Donnem's discussion of the acquisition of ownership shares by public entities originally excluded from a joint venture nuclear power plant, I note that Mr. Comegys testified that the Department of Justice does not wish to take the position that "access must always be furnished by ownership share in the plant." I have long felt that publicly owned utilities as well as private utilities and regulatory bodies should be aware of the fact that there are risks as well as possible advantages to such ownership. My experience dealing with consortia of private and public participating groups indicates that such joint ownership may well create significant management problems that must be taken into account. (Hearings, Pt. 1, pp. 283-284.)

The Commission further stated in responses to questions posed to it by the Joint Committee:

> Normally, where the organization and financing of the project and the plant construction had been completed, it would probably be undesirable and contrary to the public interest if the need for power is to be satisified on a timely basis to require substantial changes in the organization and financial plan to permit the participation of nonmembers, such as small utilities, in the organization and management of the project. Participation in ownership normally should not be necessary to assure that nonmember organization has access to the economic advantages that can be realized from large scale nuclear generating stations. It would still be feasible and appropriate to consider whether the antirust situation is such as to require the applicant for an operating license to make power available to other utilities and to consider the terms and conditions of such availability. (Hearings, Pt. 1, p. 100.)

Another licensing board reviewing the legislative history has concluded that the only special circumstance mentioned as probably requiring joint ownership was the case where some competitors have formed a joint venture which deliberately excluded other competitors. It found no case where the sole owner of nuclear facilities was compelled to enter a joint venture with a competitor.[30]

B. Public Interest Considerations

It is indisputable that these antitrust laws embody a fundamental national policy regarding the preservation of competition in our economic system.[31] But a finding of inconsistency with the antitrust laws under Section 105c(5) does not end the inquiry, but leads to a consideration of other public interest factors in accordance with Section 105c(6). The latter section requires the Commission then to consider "such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest" (42 U.S.C. Section 1235(c)(6)). As the Joint Committee observed in its Report,

[30] *Louisiana Power & Light Co.* (Waterford Steam Generating Station, Unit No. 3), LBP-74-78, 8 AEC 718, 730 (1974), holding: "The question of the appropriate form of access was given considerable coverage during the Hearings of the Joint Committee on Atomic Energy, herein-before identified. The consensus appears to be that, while in specific cases it may be desirable to require joint ownership, in general access either in the form of unit power or of joint ownership is adequate (Joint Committee Hearings, Part 1, pages 75, 128, 134 and 147; Part 2, pages 361, 409-10, 429). The only special circumstance mentioned as probably requiring joint ownership was in the case where there was already a joint venture which deliberately excluded some potential participants (Joint Committee Hearings, Part 1, page 134). Turning now to the decisions of courts and administrative tribunals, this Board has found no case where the sole owner of a facility has been required to enter a joint venture with a competitor. Certainly, no such case has been cited to the Board."

[31] *Kansas Gas and Electric Co., et al.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 568 (1975).

> On the basis of all its findings—the finding under paragraph (5) and its findings under paragraph (6)—the Commission would have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate. . . . The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time accommodating the other public interest concerns found pursuant to paragraph (6). Normally, the committee expects the Commission's actions under paragraph (5) and (6) will harmonize both antitrust and such other public interest considerations as may be involved. (H. R. Rep. No. 91-1470, reprinted in U.S. Code Cong. Serv. 5011-12.)

We now turn to a consideration of those other public interest concerns which are to be harmonized with and accommodated to antitrust values.

In his statement of principles, Mr. Donnem noted that "it may well be necessary in some circumstances to make explicit allowance" for the competitive advantage enjoyed by municipally owned companies because of their tax exempt status, because a failure to do so might confer an unfair competitive advantage and "thus hamper competition and perhaps discourage the very creation of large scale generating facilities" (Hearing, Pt. 1, p. 10). Applicant has urged that the granting of compulsory joint ownership to AEC, which enjoys tax and lower interest advantages as well as 35-year all-requirement contracts with some of its members, would amount to "competitive overkill." The Department, Staff and AEC contend that the latter's tax and financing advantages are the result of governmental policies, which should be maintained by the form of remedy and which should not be taken into account in a negative manner as perhaps suggested by analogy to Mr. Donnem's statement.

The Board has concluded that a consideration of AEC's tax and other advantages is irrelevant for all purposes under the facts of the instant case. We thereby adopt in part the Department's suggestion that "one takes his competitors as he finds them." It would be time consuming and probably fruitless to attempt to trace with certainty all of the economic impacts of AEC's advantages for a long period of time in the future, and then to seek an elusive formula to compensate for such competitive advantages. By the same token, there is no good reason to fashion a remedy deliberately designed to extend and multiply such preexisting advantages to a situation not expressly contemplated by Congress. All parties give lip service to the principle that antitrust remedies should not be punitive, and their purpose is not to punish the wrongdoer.[32] The most

---

[32] *Hartford Empire Co.* v. *United States*, 323 U.S. 386 (1946); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947).

equitable way to harmonize this principle with the public interest considerations of Section 105c(6) is neither to discount nor to deliberately extend AEC's advantages in imposing license conditions.

Another circumstance to be weighed in any public interest consideration in this case relates to the "grandfathered" nature of the antitrust review. Applicant filed its original application for a construction permit on October 10, 1969, and an amendment for authority to construct a second nuclear facility on June 26, 1970, prior to the December 1970 amendments to Section 105c. The Commission issued a notice of antitrust hearing on June 28, 1972. Applicant's prior planning contemplated the utilization of all of the Farley Plant's capacity on its own system. Had a prelicensing antitrust review been conducted at the construction stage, Applicant would have been advised of any license conditions which affected its utilization of Farley power. While it is true that Applicant had been apprised at the construction stage that antitrust allegations were being asserted by the Department and others, it could not have known what ultimate findings would be made on liability. Indeed, Applicant does not know today what remedies will be imposed with finality.

While the equities flowing from the "grandfathered" situation are less compelling than if construction had been completed before the antitrust provisions of Section 105c were adopted, nevertheless some of the same equitable considerations are applicable. The Joint Committee was concerned about such a situation and queried both the Commission (then Atomic Energy Commission (AEC)) and the Department about such a result. The Commission replied:

> We would expect both the Department of Justice and the AEC, in conducting their prelicensing review, to take into account the status of the project at the time it is being reviewed. Normally, where the organization and financing of the project and the plant construction had been completed, it would probably be undesirable and contrary to the public interest if the need for power is to be satisfied on a timely basis to require substantial changes in the organization and financial plan to permit the participation of nonmembers, such as small utilities, in the organization and management of the project. Participation in ownership normally should not be necessary to assure that the nonmember organization has access to the economic advantages that can be realized from large scale nuclear generating stations. (Hearings, Pt. 1, p. 100.)

The Department took a similar view with respect to plants which had received a construction permit:

> We would expect that in recommending any action in such circumstances we would take account of a practical situation in which the utility would find itself at the time of the advice. Our intention would be to make our advice as accurate and clear as is possible with respect to antitrust problems,

but also to recommend corrective action which would cause as little dislocation as possible, to the end of producing an overall gain to the public. (Hearings, Pt. 1, pp. 136-137.)

The Commission also has recently considered the public policy reasons underlying an "anticipatory" antitrust review in connection with licensing. In a case involving the availability of antitrust review subsequent to the issuance of a construction permit but prior to the commencement of operating license proceedings, the Commission said:

An area of special concern during consideration of the 1970 amendments centered on whether antitrust review should take place at both the construction permit and operating license stages. The AEC proposed that review take place at both stages, with a mechanism to "exclude from consideration at the operating license stage cases that had been handled at the construction permit stage to the satisfaction of the Justice Department."

Chairman Holifield expressed considerable concern about this suggestion. (Hearings at 37-38):

I am concerned with the mandatory requirement in the AEC bill to review at both the construction and operating license stages. It seems to me that the Joint Committee's bill which requires mandatory review on the antitrust problem at the construction stage is a practical and sound way to approach it. I think if you hold over the head of any investors of $100 million in a plant, let us say, the fact that he builds the plant to channel the power into his own system of distribution, at that point he should be made aware of any diversion from that plant to another source. He should not be put in a position, it seems to me, of double jeopardy in that he is given the construction permit to proceed without antitrust review and then suddenly 6 years later, or 7 years, whenever his plant is finished, he is faced with an intervenor or a legal situation in which he has to go again through the process of antitrust review.

. . . here again you have a permissive act on your part, and a benevolent act on your part, or an antagonistic act at this time, 5 or 6 or 7 years later, after the investment has been made and the plans of the utlity, regardless of who they might be, were made at the time of construction as to the feed-in of that power into their systems.

Suddenly they are faced with a diversion, let us say, of 25 or 30 or 40 percent of their power into another system. So, it seems to me that the Joint Committee's position of mandatory review before construction as

> far as the antitrust problem is concerned ought to be final in fairness to the investors. They go in then with their eyes open and they are treating the problem on the basis of a determined fact which does not damage their prior planning and the reason for investing in the first place.

> Chairman Holifield's concerns were reflected in the final language of the section, providing for thorough review at the construction permit stage, and a second review only upon the finding of "significant changes." (*Houston Lighting & Power Company, et al.* (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303 at 1315-1316 (1977).)

In harmonizing antitrust with other public interest considerations under the directions of Section 105c(6), the need for power in the affected area is expressly included in the statute. The evidence shows that using the projected peak demands of Applicant for the years 1977-80, the percentage of reserves from its own resources will fall as low as a negative 1.2 percent without inclusion of the Farley capacity (APP. X II-5). The desired level of reserves would range between 20 and 25 percent (Tr. 28,099-100). While the Applicant could and would purchase capacity from other members of the Southern Company pool, these facts show that the Farley plant was planned to utilize all of its capacity by Applicant. Although this would not constitute an "extraordinary situation" sufficient to override our affirmative findings under Section 105c(5), it should be taken into consideration in fashioning a remedy adequate to prevent anticompetitive activities but with the least disruption of the planned use of the Farley facilities.

Applicant contends with some merit that its conduct since 1972, the date of its last anticompetitive conduct, should militate against the imposition of unnecessarily harsh or onerous remedies. As the Supreme Court observed in a case involving injunctive relief for a violation of Section 8 of the Clayton Act,

> To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.[33]

With reference to the alleged cessation of anticompetitive conduct as a mitigating factor, the Board has identified five types of conduct from which a pattern was discerned (p. 1490-1491, *supra.*). All of this conduct began in the early 1960's, and did not extend beyond early 1972. The Ft. Rucker transaction in 1962-1973 involved a threatened refusal to sell wholesale power to AEC if the latter sought to use it to underbid Applicant in supplying the power needs of Ft.

[33] *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

Rucker, an existing customer of Applicant. The record shows no subsequent conduct of this type by Applicant, which for many years has conceded and fulfilled its duty to sell wholesale power to AEC, which can use such power to compete for Applicant's customers.

The second anticompetitive action occurred in the mid and late 1960's, in connection with the development and formation of SERC. There has been no subsequent concerted or individual conduct by Applicant to preclude small electric utilities in central and southern Alabama from obtaining the benefits of economic coordination, and this matter can be covered by appropriate license conditions. The third factor involved Applicant's refusal to offer AEC fair coordination from 1968 to 1972. However, the interconnection agreement entered into in February 1972 was reasonable and did not deny AEC access to power exchange or coordinating services in an anticompetitive manner (p. 1489, *supra*.). We observed that the "protective capacity" provision was an unusual one and should be eliminated from the interconnection agreement. The parties reported at the Phase II hearing that they would be able to draft a mutually acceptable reserve sharing provision in its place. The Board also found anticompetitive conduct manifested in Section 4.2 of Applicant's 1970 agreement with SEPA, as well as in certain agreements with AEC and municipal distributors (pp. 1489, 1490, *supra*.). Counsel have now stipulated that Section 4.2 has been removed from the SEPA contract (Tr. 28,317-28, 318). There is no evidence that established conduct inconsistent with the antitrust laws beyond early 1972. In addition, in at least one instance Applicant is engaging in beneficial and significant coordination of transmission lines with AEC (Tr. 28,060). And Applicant's president, Joseph M. Farley, has testified that the company is willing to negotiate an agreement with AEC regarding access to the future Barton plant if it is ever constructed, including prompt notice to AEC of all milestone decision steps in that regard (Tr. 27,955-27,956, 27,958-27,960).

The Board regards the above mitigating factors as significant in evaluating the public interest under Section 105c(6). The purpose of antitrust review and appropriate license conditions is remedial, not punitive. Such affirmative action as has taken place is in the public interest, since in the parlance of legislative politics it is better to have a bill than an issue. Long after counsel for the Department and Staff have moved on to other litigation, Applicant and AEC will be living together and competing for the generation, transmission and sale of wholesale power in central and southern Alabama. Whatever license conditions we impose should reflect this situation in the real world of the electric power industry.

IV. LICENSE CONDITIONS

After weighing and evaluating the various antitrust and other public interest

concerns described above, the Board has concluded that the license conditions should include an opportunity for AEC to have access to the Farley nuclear facilities on a proportionate unit power purchase basis for the entire actual life of the units in question. Unit power has been defined as power purchased on a contractual basis in the form of a percentage share of the output from a particular power plant. The cost of unit power includes the owner's cost of capital, costs of construction, cost of fuel and operation, and a rate of return on investment (Tr. 27,126-27,128, 27,133-27,134, 27,834-27,836). If unit power is the form of access employed, Applicant and AEC will have essentially equal costs for the nuclear power. Unit power participation on a proportionate share basis leaves the competitive situation in effect undisturbed, and AEC would retain its tax and financing advantages (Tr. 28,141), with the Farley plant neither adding to nor subtracting from AEC's ability to compete. This result is reasonable under all of the circumstances in this case. Unit power participation will ensure that "competitive opportunities are equalized and decisive competitive advantage avoided," as sought by the Department's Mr. Donnem (Hearing, Pt. 1, p. 10). It will also avoid the "significant management problems" that Commissioner Ramey of AEC envisioned from joint ownership (Hearings, Pt. 1, p. 284).

Some objections have been advanced to unit power participation on the grounds that it is not enough to provide AEC access to the presumably lower cost nuclear power at the same cost as Applicant's. Reference has been made to AEC being the "victim" of Applicant's business operations, with the corresponding requirement that the industry be "pried open," or the monopoly power "broken up."[34] This view fails to take into account the facts in this case, which show that Applicant's market dominance which had been achieved by 1962 was not a "market that has been closed by defendants' illegal restraints,"[35] nor the result of an illegal "combination" of defendants engaged in predatory conduct.[36]

Applicant had built up its large generation and transmission system prior to 1962 by a series of business decisions and operations which we have found were not inconsistent with the antitrust laws. Its generating capacity was expanded to fulfill periodic load projections, not to preclude or hinder competition. The transmission lines were extended to supply customer needs for electricity, not to victimize AEC or others. Economies of scale, desirable for the best utilization of resources, were developed by legal business means common to the industry. Indeed, the causes for the disproportionate size of Applicant and its competitor AEC, which produced the dominant market position of the former in central and southern Alabama by 1962, were not the result of anticompetitive or illegal

[34] Phase II Briefs; Staff, pp. 8, 20; AEC, pp. 14, 19; Department, pp. 15-16, 31, 42.

[35] *Ford Motor Co.* v. *United States*, 405 U.S. 562, 577-578 (1972).

[36] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577 (1966).

conduct. Rather, such dominance resulted from substantial advantages which Applicant obtained from its participation in the Southern Company pool. As we have previously pointed out, [redacted] holding company pool and its resulting economies of scale are perfectly [illegible] and reflect the Congressional intent regarding electric holding companies.

We did identify five areas of anticompetitive conduct engaged in by Applicant from the Ft. Rucker transaction in 1962-1963 up to the execution of the interconnection agreement in early 1972, as discussed above (pp. 1500-1501). However, the record does not show that such course of conduct caused any appreciable increase in Applicant's preexisting size or market dominance. The delays in AEC's financing and building of its generating capacity and transmission system resulted largely from litigation during the 1960's, which we found to be reasonable under the circumstances and not anticompetitive misconduct (Initial Decision, 5 NRC at 907-908, 940-942).

Applicant's adversaries have had the benefit of the broad sweep of Section 5 of the Federal Trade Commission Act, as well as the "incipiency" line of cases under the antitrust laws, in our findings in the liability phase of a course of conduct during 1962-1972 which was anticompetitive in nature. The Staff particularly sought the benefit of Section 5 FTC cases which went beyond the narrower confines of Sherman and Clayton Act violations to establish liability under the "inconsistent with" language of Section 105c(5). It is not reasonable when we come to the remedy stage to equate the harshest or most onerous remedies meted out by the courts to repeated and deliberate antitrust violators, with the lesser types of inconsistent conduct shown by the record in this case. It is close to overreaching to demand the full panoply of license conditions granted by the licensing board in the *Davis-Besse* case, while ignoring any discussion of the flagrant, deliberate and repeated illegal conduct of the joint perpetrators in violation of Sections 1 and 2 of the Sherman Act which the Board found in that case.[37] We also decline to make any collateral study of the bases for the 19 settlement agreements resulting in accepted license conditions which the Department lists in its brief at pp. 25-27. For all we know from this record, all of those cases could have involved misconduct as flagrant as that described in *Davis-Besse*, *supra*. It is the normal policy of the law to encourage settlements, and to that end to shield from disclosure evidence as to settlement negotiations and matters said or done therein. In any event, it would be fruitless and unduly prolong this proceeding to engage in such collateral inquiry. It would be manifestly unfair to accept representations of counsel outside the record to establish facts which the

[37] *Toledo Edison Company, et al.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), LBP-77-1, 5 NRC 133 (1977). *See also* Phase II Briefs: Department, pp. 11-13; Staff, p. 6; AEC, pp. 53, 67.

opposing party could neither address nor disprove. All such statements of counsel have therefore been disregarded as evidence in this case.[38]

In addition to unit power participation, we have also held that AEC should be given such access to Applicant's transmission system as is reasonably necessary to enable AEC to make effective use of nuclear-generated power as a bulk power supplier (Initial Decision, 5 NRC at 959). The purpose of this transmission requirement is to allow AEC the effective use of its participation entitlement, not to transform Applicant into a common carrier of electric power by requiring it to wheel "anytime, anyplace, anywhere" (Tr. 27,419; 28,219). Transmission or wheeling license conditions should have a reasonable relationship to AEC's effective use of Farley plant power, and should avoid the possibilities for mandatory or premature additions to Applicant's system in order to accommodate requests for transmission services as well as the inherent reliability problems associated with universal and on-demand services (Tr. 27,946-27,948; 27,973-27,975). The license conditions should also provide such supplementary or partial requirements as may be needed to satisfy the requirements of AEC's off-system members over and above the Farley power allocated to them, and over and above the SEPA allotment which Applicant is contractually committed to deliver to such customers.

The scope of appropriate remedies in connection with transmission or wheeling is inextricably tied up with the nature of the anticompetitive conduct. In some respects, the relief to be afforded by license conditions is the reverse side of the liability coin. The Commission addressed this problem in *Waterford I* as follows:

---

[38]We do note that in one of the Waterford cases cited by the Department, Louisiana Power and Light Company (Waterford Steam Generating Station Unit No. 3), a licensing board subsequently stated:

> This is not to say that the Applicant's Commitments have attempted to provide the maximum or even the optimum opportunity for competition. Nor will the conditions hereinafter fashioned by the Board provide the maximum conceivable possibilities for competition in the sale of power. Rather the Board considers that the latter conditions would provide *adequate* relief for the situation assumed *arguendo* . . . .
>
> It is certainly true, we believe, that joint ownership will be a less expensive form of access for the Cities than unit power. The savings is merely a monetary advantage to the Cities based on tax advantage and is not a savings of resources. If unit power is the form of access employed, the Applicant and the public-owned entities have essentially equal cost; while joint ownership form of access would give the latter a cost advantage.
>
> The purpose of injunctive relief in an antitrust situation is not to punish the party to which the injunction is directed, but is to remedy an imbalance in competition. Similarly in the present proceedings, the purpose of conditions to the proposed license is neither to punish the Applicant nor to place Applicant at a competitive disadvantage versus other entities. The purpose of conditions is to prevent activities under the license from unduly hindering competition. Access in the form of unit power is adequate to accomplish that purpose since it places on a competitive basis Applicant and entities having access to Applicant's facilities. (LBP-74-78, 8 AEC 718, 731 (1974).)

> Primarily, the pleadings fail to identify the specific relief sought by each petitioner, and whether, how and the extent to which the request fails to be satisfied by the license conditions proposed by the Attorney General. Apart from the Cities' references to access to the Waterford Unit, the various petitions discuss a wide array of alleged antitrust practices, including. . . (b) refusals to permit meaningful integration of generation and *transmission* facilities, (c) refusals to permit use of applicants' *transmission lines for "wheeling"* and other purposes. . . . However, the pleadings generally fail to specify the *relationship*, if any, between these practices and the "activities under the license" involved in this proceeding. In other words, although to describe practices may constitute "situations inconsistent with the antitrust laws" or the policies underlying those laws, it is not clear that they would be "created" or "maintained" by "the activities under the license." (*Louisiana Power & Light Co.* (Waterford Steam Generating Station, Unit 3), 6 AEC 48, 49 (1973) (emphasis supplied).)

Again, in *Waterford II*, the Commission gave some guidelines to access to transmission:

> At the same time, however, we must emphasize that the specific standard which Congress required for antitrust reviews—"whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws specified in Subsection 105a"—has inherent boundaries. It does not authorize an unlimited inquiry into all alleged anticompetitive practices in the utility industry. The statute involves licensed activities, and not the electric utility industry as a whole. . . . As stated in our earlier memorandum in this proceeding, the statutory phrase does not necessarily include all of the applicant's generation, *transmission*, and distribution of electricity. Neither is that phrase automatically limited to the construction and operation of the facility to be licensed. In our view, the proper scope of antitrust review turns upon the circumstances of each case. The relationship of the specific nuclear facility to the applicant's total system or power pool should be evaluated in every case. *Denial of access to transmission systems would be more appropriate for consideration where the systems were built in connection with a nuclear unit than where the systems solely linked non-nuclear facilities and had been constructed long before the application for an AEC license.* (Louisiana Power & Light Co., *supra.*, 6 AEC 619, 620-621 (1973) (emphasis supplied).)

The Appeal Board has also considered the issue of access to transmission in its *Wolf Creek II* decision, a case that was decided at the pleading stage.[39] In

[39] *Kansas Gas and Electric Co. and Kansas City Power and Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-299, 2 NRC 740 (1975).

that case, an intervening cooperative had been offered ownership participation in the nuclear plant plus wheeling of its allotted share of power and some "wheeling in" and "wheeling out" of power from third party sources. However, the cooperative contended that these proposed conditions (which the Attorney General had recommended) were insufficient because they did not require the applicant to wheel supplemental power. It was alleged that the nuclear generated power could only be employed as base load power, and that without assured access to a source of supplemental power, the cooperative could not obtain the financing it needed to secure an interest in the facility. It was further alleged that the practical effect of the limitations upon wheeling supplemental power was to prevent participation in the nuclear plant. While the Appeal Board held that the amended petition adequately alleged that the applicant's refusal to wheel supplemental power would have an exclusionary effect on competition, it further stated:

> But the applicant insists that the relief sought—in effect general wheeling—is much broader than any relief to which KEC conceivably might be entitled. The applicant might prove to be right in this belief. We agree with the staff, however, that it is not possible at this juncture to determine this matter; whether general wheeling, more limited wheeling or no additional wheeling at all should be directed will become clear only upon establishment of the relevant facts. (2 NRC at 750)

Under the facts in the instant case, we believe that AEC should have unit power participation in the Farley units, such transmission or wheeling as is reasonably necessary to enable it to make effective use of that power including obtaining supplemental power, and an opportunity to obtain bulk power when there is an outage at the Farley facilities for any reason. Appropriate conditions should provide for a long-term arrangement for the service life of the Farley nuclear units by which AEC can obtain a proportionate amount of the output of such units on a unit power cost basis. Such unit power participation should be on the basis of the proportion of AEC's on- and off-system wholesale loads in central and southern Alabama to the total loads of both parties in such area, such calculation being based on the proportion prevailing at the time of the most recent peak condition in 1976. AEC should be provided reasonable transmission services to enable it to deliver power from the Farley nuclear units to (a) the integrated electric system of AEC, and (b) the off-system members of AEC in south and central Alabama.

For the foregoing reasons, the Board adopts the following license conditions which shall be made a part of any licenses issued to Applicant for the Joseph M. Farley Nuclear Plant, Units 1 and 2:

1. Licensee shall recognize and accord to Alabama Electric Cooperative the status of a competing electric utility in central and southern Alabama, and

shall take no actions and engage in no course of conduct having the purpose and effect of treating AEC as a mere customer of licensee for the sale of wholesale power.

2. Licensee will sell to Alabama Electric Cooperative, Inc. ("AEC"), unit power from Units 1 and 2 of Joseph M. Farley Nuclear Plant. The amount of capacity to be sold by Licensee from such units to AEC shall be an amount based on a ratio of (a) the aggregate coincident demand of all wholesale-for-resale members of AEC in Alabama during the hour of peak demand on the electric system of Licensee in 1976 to (b) the sum of such coincident demands of AEC and the territorial peak-hour demands of Licensee (excluding therefrom the peak-hour demands imposed by members of AEC upon the electric system of Licensee) during the hour of peak demand on Licensee's electric system in 1976. Contractual arrangements will be entered into between Licensee and AEC by the terms of which AEC will be entitled to purchase and receive the percentage of electrical output of the respective Farley units determined in accordance with the foregoing ratio. Such output from the respective units will be supplied by Licensee to AEC for the entire commercial service life of the particular units. Such contractual arrangements will also provide that AEC shall pay Licensee on a monthly basis for the capacity portion of such unit power, amounts representing the percentage of Licensee's fixed costs in such nuclear units based upon the ratio described above. Such contractual arrangements shall also provide that AEC shall pay Licensee on a monthly basis for the energy portion of such unit power, amounts representing the percentage of Licensee's variable costs incurred in the operation of such units based upon the ratio of energy generated for AEC's account to the total energy generated by such units during the billing month. The provisions of such contractual arrangements shall clearly provide that the net effect of such payments to be made by AEC shall be that AEC will *pay its proportionate share* of Licensee's *total costs* related to such nuclear units including, but not limited to, all costs of construction, installation, ownership, licensing and operation of such units, but no more than such proportionate share. The contracts covering such unit power shares shall embrace pricing and charges reflecting conventional accounting and rate-making concepts established and applied by the Federal Power Commission or its successor in function, and any disputes concerning the identification or application of such concepts shall be determined by and in accordance with procedures of the Federal Power Commission or its successor in function.

3. Licensee will provide transmission services to enable AEC to receive on its electric system such portion of its entitlement to the output of the Farley

units as AEC requires in the operation of its integrated electric system, and, in addition, Licensee will provide transmission services to the existing members of AEC physically connected to Licensee to enable such members to utilize any of the allocation of AEC's portion of the output of the Farley units. Contractual arrangements will be entered into between Licensee and AEC or, at the option of AEC, between Licensee and such members by the terms of which Licensee will be paid for such transmission services on the basis of the ownership, maintenance and operation costs associated with such transmission services. The contractual arrangements covering such transmission services shall embrace rates and charges reflecting conventional accounting and rate-making concepts followed by the Federal Power Commission or its successor in function in testing the reasonableness of rates and charges for transmission services. Such contractual arrangements shall contain provisions protecting Licensee against any economic detriment resulting from transmission line or transformation losses associated with such transmission services.

4. Licensee will also provide AEC such other bulk power supply services as may be required by it or such members to cover situations where such unit power to which AEC shall become contractually entitled is unavailable because of forced outages, maintenance requirements or other unavailability of the Farley Nuclear Unit for any reason whatever. Such additional or supplemental services may be considered in the context of the 1972 Interconnection Agreement now in effect or as such agreement might be modified in accordance with paragraph four hereof. In addition, Licensee will supply the partial power requirements of the existing members of AEC physically connected to Licensee which may be reasonably necessary to cover their requirements over and above (a) the power available to them through their arrangements with SEPA and (b) the allocation of any unit power from AEC under the arrangements contemplated under paragraphs two and three above. The contractual arrangements covering the services described in this paragraph shall be on a basis reflecting Licensee's costs and at rates and charges reflecting Licensee's costs and at rates and charges reflecting conventional accounting and rate-making concepts followed by the Federal Power Commission or its successors in function.

5. Licensee will enter into appropriate contractual arrangements amending the 1972 Interconnection Agreement as last amended to provide for a reserve sharing arrangement between Licensee and AEC under which the reserve obligation of AEC is no greater than the reserve obligation undertaken by Licensee under the terms of the Southern Company Pool Interchange Agreement. It is the intent and purpose of such contract modifica-

tion to eliminate from the 1972 Interconnection Agreement between Licensee and AEC a provision relating to protective capacity purchased by AEC.

6. The foregoing conditions shall be implemented in a manner consistent with the provisions of the Federal Power Act and the Alabama Public Utility laws and regulations thereunder and all rates, charges, services or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them.

V. ORDER

IT IS ORDERED, in accordance with the Atomic Energy Act of 1954, as amended, and the rules and regulations of the Nuclear Regulatory Commission in accordance with Sections 2.760, 2.762, 2.764, 2.785 and 2.786 that this Initial Decision shall become effective immediately and shall constitute, with respect to the matters covered herein, the final action of the Commission forty-five (45) days after issuance hereof, subject to any review pursuant to the above-referenced rules. Exceptions to this Initial Decision may be filed by any party within seven (7) days after service of this Initial Decision. A brief in support of the exceptions must be filed within fifteen (15) days thereafter [twenty (20) days in the case of the NRC Staff]. Within fifteen (15) days of the filing and service of the brief by the Appellant [twenty (20) days in the case of the NRC Staff], any party filing such exceptions shall file a brief in support thereof.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller, Member

Dr. Kenneth G. Elzinga, Member

Michael L. Glaser, Chairman

Dated at Bethesda, Maryland
this 24th day of June 1977.

APPENDIX F

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
Peter A. Bradford
John F. Ahearne
Thomas M. Roberts

In the Matter of

Docket Nos. 50-348A
50-364A

ALABAMA POWER COMPANY
(Joseph M. Farley Nuclear Plant
Units 1 and 2)

October 22, 1981

MEMORANDUM AND ORDER

The Commission has determined to grant neither Alabama Power Company's (APCO) nor Municipal Electric Utility Association's (MEUA) petition for review of the Atomic Safety and Licensing Appeal Board's decision of June 30, 1981 (ALAB-646) in the captioned case.

APCO has sought review of the Appeal Board's decision in the United States Court of Appeals for the Fifth Circuit[1] and on July 22, 1981 moved the Commission to stay during the pendency of litigation the effectiveness of certain remedial antitrust conditions imposed on APCO's licenses to operate the Farley nuclear units.

Commission regulations and precedent establish the agency law governing decisions on stays and comport with judicial case

[1] *Alabama Power Co. v. Nuclear Regulatory Commission and United States*. Nos. 80-7547 and 80-7580. Alabama Electric Cooperative (AEC) and MEUA have intervened in that proceeding.

law. Section 2.788 of the Commission's regulations sets out the following factors to be considered in reviewing a request for a stay:

(1) whether the moving party has made a strong showing that it is likely to prevail on the merits;
(2) whether the party will be irreparably injured unless a stay is granted;
(3) whether the granting of a stay would harm other parties; and
(4) where the public interest lies.[2]

The burden of persuasion on these factors rests on the moving party.[3] While no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay.[4] To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal.[5] In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak.[6] Moreover, where an applicant is asking "as a preliminary matter for the full relief to which [it] might be entitled if successful at the conclusion of [its] appeal . . . [it] has a heavy burden indeed to establish a right to it."[7]

---

[2]10 CFR 2.788 codifies the criteria established by *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 295 F.2d 921, 925 (D.C. Cir. 1958).

[3]*Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978).

[4]*Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977), citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968).

[5]*The Toledo Edison Company, et al.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), LBP-77-7, 5 NRC 452 (1977), citing *Environmental Defense Fund, Inc. v. Froehike*, 348 F.Supp. 338, 366 (W.D. Mo. 1972), *aff'd* 477 F.2d 1033 (8th Cir. 1973).

[6]*Florida Power and Light Company* (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 and ALAB-415, 5 NRC 1435, 1437 (1977).

[7]*Toledo Edison Company* (Davis-Besse Nuclear Power Station, Unit No. 1), ALAB-385, 5 NRC 621, 626 (1977).

On consideration of APCO's motion and the responses in opposition to it filed by the other four parties to this proceeding,[8] the Commission has determined that APCO's request does not merit the grant of the extraordinary relief requested.[9]

Accordingly, the application for a stay is denied.

Commissioner Bradford dissents in part from this order. His separate view is attached.

Commissioner Gilinsky did not participate in this decision.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
the 22nd day of October, 1981.

SEPARATE VIEWS OF COMMISSIONER BRADFORD

I agree with the result of the Commission's decision as to Alabama Power Company. However, I would take review of that portion of the Appeal Board's decision that finds that MEUA is not a potential wholesale competitor.

---

[8]In addition to APCO, MEUA and AEC, parties in the proceeding were the Department of Justice (Department) and the Nuclear Regulatory Commission staff (Staff).

[9]APCO requested oral argument on both its stay request and on its petition for review. As the Commission perceives no need for oral argument on either of these motions and the question of whether to hold oral argument is entirely a matter of Commission discretion, APCO's requests are denied.

APPENDIX G

LEGISLATIVE HISTORY OF THE RURAL ELECTRIFICATION ACT OF 1936

A. Excerpts From Sen. Rep. No. 1581, 74th Cong., 2d Sess. (Feb. 17, 1936).

"Mr. Norris, from the Committee on Agriculture and Forestry, submitted the following

REPORT

[To accompany S. 3483]

"The Committee on Agriculture and Forestry, to whom was referred the bill (S. 3483) to provide for rural electrification, and for other purposes, having had the same under consideration, report as follows:"

* * * * * *

"This proposed legislation would create and establish an agency of the United States to be known as the Rural Electrification Administration. * * * It would become the duty of the Administrator to promote in the United States the electrification of rural areas not now receiving central-station light and power service. He would do this by making loans, principally to organizations of farmers desiring to electrify their homes. The bill provides that such loans shall be self-liquidating within a period of not to exceed 40 years, and that they shall bear interest at a rate not to exceed 3 percent. It also provides that such loans may be made payable out of income.* * *"

* * * * * *

"The bill was by the committee referred to the Secretary of Agriculture, to the Rural Electrification Administration, to the Federal Power Commission, and the Interior Department. All these agencies most heartily approve the bill. The bill has also received the approval of all the leading farm organizations of the United States." (p. 4)

B. Excerpts from Senate Debate on S. 3483, 74th Cong., 2d Sess. (1936).

"Mr. Norris. Mr. President, I desire to make a brief explanation for the rural-electrification bill now pending before the Senate." (80 Cong. Rec., p. 2750.)

* * * * * *

"Under one of the various appropriations made by the present Congress in a prior session there was established by the President a Rural Electrification Administration. That Administration has been engaged in active work ever since its establishment. It is the basis of the proposed legislation." (80 Cong. Rec., p. 2751.)

* * * * * *

"Mr. Norris. *** It is attempted by the proposed legislation, so far as possible, to have all the organizations local in their nature controlled by their owners, the farmers, who borrow money from the Federal Government, and set up distribution systems, and perhaps in some cases generating systems, and supply themselves with electricity.* * *"

* * * * * *

"Mr. McNary. I have my own idea as to the interpretation and definition of the expression 'electrification of rural areas not receiving central-station electric light and power service.' What interpretation does the Senator place upon that language? Could he illustrate it?

"Mr. Norris. That means, as I understand, and as I think the present administration is now doing, that there will not be set up an organization and money loaned to it for the purpose of electrifying a rural area which is now supplied. There are now, of course, a large number of rural districts already supplied with electricity from central power stations. But it does not mean that the agency proposed to be established will be prohibited from going into a locality where there may be a large number of local plants used by individual farmers. In a great many places generators of various kinds produce electricity lo-

cally for some particular farmers. The language referred to would not prohibit the setting up of an organization in a locality where that kind of supply was already in existence.

"Mr. McNary. We probably are together generally, but under the language used, it seems to me, where a plant is now in existence which is adequately supplying a certain area with electricity none of the money provided by the bill could be used for that purpose.

"Mr. Norris. That is as I understand it.

"Mr. McNary. I agree with that, but supposing that some central station by the construction of distribution lines and transmission lines could supply the energy needed in a given area, could the money be used for that purpose?

"Mr. Norris. If I understand the Senator's question correctly, it is supposing some locality be now supplied from a central station, might it be possible for that central station to extend its lines further and would the governmental agency be prohibited from entering that territory? If that is the question, I think not.

"Mr. McNary. I think we want a definite meaning fixed, because I think it is an important proposition. The prohibition would relate to a central station furnishing light and power in an area that is now enjoying adequate service. Is that the Senator's interpretation?

"Mr. Norris. Yes." (80 Cong. Rec., p. 2751.)

* * * * * *

"Mr. Norris. There is no intention of going into a farming community which is already supplied with electric current and forming farm organizations there and having them built up to go into competition, as the Senator suggests, with farmers who are already getting their electric current from a central station.

"Mr. King. If an organization were formed beyond the 10-mile limit to which I have just referred and within which limit the farmers are supplied with electric energy, that organization would not be permitted to come back into the 10-mile area to furnish light to farmers already receiving it?

"Mr. Norris. Not to those already receiving it, but it might come into the 10-mile area and supply farmers who were not receiving it. That is a distinction which I think ought to be drawn." (80 Cong. Rec., p. 2752.)

"Mr. Norris. Mr. President, the bill provides that the Administrator is authorized to loan money 'for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central-station service.'

"I think that provision answers specifically some of the questions which were propounded earlier in the day by the Senator from Utah Mr. King. It will be noticed that the Administrator does have authority to loan money for the purpose of establishing generating systems, and yet it is not expected that that will be done very frequently. In fact, the idea, so far as I know, is to buy the electricity from some existing plant. However, it might be found necessary at some time to establish generating systems; and if we did not give the Administrator authority to lend money for such purposes, generating systems could not be financed, ***" (80 Cong. Rec., p. 2756.)

* * * * * *

"Mr. Hastings. What power interest furnishes that electricity? Is it a private interest?

"Mr. Norris. It is both private and public. The plan of the Rural Electrification Administration is to form an organization of farmers sufficient in number so that it will be a self-liquidating proposition, and, if possible, to buy their electricity at wholesale, either from a publicly owned plant in the vicinity or from a privately owned plant in the vicinity." (80 Cong. Rec., p. 2820.)

* * * * * *

"Mr. Norris.*** (80 Cong. Rec., p. 2822.)

* * * * * *

"I desire to refer to the money the R.E.A. have used, but first let me refer to a memorandum of Mr. Cooke about what they do in passing on these projects.

" 'R.E.A. can make loans for generating plants.'

"I asked him specifically about that, because I knew, from the way they were operating, it was very seldom that there was a generating plant involved, and I anticipated that some Senator would ask questions about generating plants. As I stated yesterday, it would not be practicable to construct a farm line somewhere and build a generating plant for it; that would cost too much. A generating plant, to be efficient, would have to be sufficiently large to supply a number of farm lines. That is the point he is answering here.

" 'R.E.A. can make loans for generating plants, but we must be shown conclusively:

" '(1) That energy is not available from any existing source.

" '(2) That the proposed generating plant can produce energy at a lower cost than it could be obtained from any source.

" '(3) That the output of such plant will be used mainly for supplying energy for use in rural areas.'

". . . The R.E.A. will not make a loan unless the generating plant privately owned or municipally owned — it does not make any difference — will agree to supply the electricity at what the R.E.A. knows it can be supplied for, and leave a little profit, though no large profit. On the other hand, in the case of a community having a municipally owned plant, if they have an excess of energy very seldom would they charge an exorbitant rate. They would be getting paid for something they would otherwise lose, and they could afford to sell it at even less than cost and make money because it would all be clear gain." (80 Cong. Rec., p. 2823.)

"Mr. Overton. The loans, as I understand, are to be made to the corporations for the purpose of generating electric power and transmitting electric power into rural areas.

"Mr. Norris. They might be.

"Mr. Overton. But, under the provisions of the bill, their powers to furnish current in these rural areas are restricted not

only to the rural areas but to persons who are not receiving current in the rural areas. That is quite a limitation on the patronage of such a company, to such an extent that it occurs to me that it is very doubtful that a company would be organized for the purpose of generating and furnishing current to such a restricted class of patrons and customers.

"Mr. Norris. It probably would not be done, as experience has shown there is little likelihood of one of the corporations mentioned in this amendment building a generating plant. It would not happen except in very exceptional cases. The corporations would buy their electricity from an existing generating plant. They would borrow the money to build the transmission lines. That might not take one-tenth of the generating capacity of the generating system." (80 Cong. Rec., 2826.)

* * * * * *

"Mr. Overton. *** What I was trying to ascertain from the Senator in charge of the bill, however, was whether he had given consideration to the very limited number of patrons who could utilize the provisions of this bill as section 4 is presently drafted." (80 Cong. Rec., 2826.)

* * * * * *

"Mr. Walsh. I had assumed that the object of the bill was, in those areas where it had been found by private companies and municipalities that it is not profitable to furnish light to rural sections, to have groups in such sections organize and borrow money and establish small plants of their own. I had assumed that was the objective of the bill." (80 Cong. Rec., 3305.)

* * * * * *

"Mr. Norris.***

"Let me say this to the Senator from Massachusetts. Suppose there should be a municipality in a good agricultural section which had no electric lighting system. It would probably be a small town. Around that town within easy transmission distance there might be formed half a dozen farm organizations.

"However, those farm organizations — suppose there were half a dozen of them — would not take enough electricity to

make it advisable for the organizations themselves to build a generating system. Suppose in that case the municipality said, 'We will build a system large enough to supply these farm organizations as well as ourselves.' I should think in that sort of case, even though there was not an existing plant, they would have authority to borrow money.

"Mr. Walsh. That infers, of course, that there is no competition with any existing private or municipal plant.

"Mr. Norris. Yes." (80 Cong. Rec., p. 3305.)

* * * * * *

"Mr. Walsh. That is what I understand to be the main purpose of the bill; that in rural sections where private enterprise has not undertaken to furnish light or where a municipality has not done so, there will be opportunities given for groups of individuals, or, as the Senator says, in some cases a town or municipality itself, to set up in such rural sections units for lighting purposes.

"Mr. Norris. Yes. ***" (80 Cong. Rec., pp. 3305-06.)

C. Excerpts from Report of Hearings on S. 3483 Before House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. (1936).

"Thursday, March 12, 1936

House of Representatives,
Committee on Interstate and Foreign Commerce,
Washington, D.C.

"The committee met at 10 a.m., pursuant to call, Hon. Sam Rayburn (chairman) presiding.

"The Chairman. The committee will come to order, please.

"On January 6, Senator Norris introduced in the Senate, and I introduced in the House bills known as the rural electrification bills.

"On the 9th of March, the Senate passed their bill and it is now before us. It is quite revised, especially as to amounts from the amount carried in the original bill. There is also a

provision made as to from what source the money for the first 2 years is to come. I think it would be better for us to go along and have this hearing on the Senate bill, as passed, and not on the original Senate bill or the original House bill." (p. 1.)

* * * * * *

"Statement of Morris L. Cooke, Administrator,
Rural Electrification Administration.

"The Chairman. Hon. Morris L. Cooke is at the present time Administrator of Rural Electrification Administration, set up by Executive order of the President, and I have asked him and he has kindly consented to come before the committee this morning and tell us his understanding of this bill, and to review in some wise the work that has been done in this country and the work in rural electrification in other countries in comparison with ours." (p. 4.)

* * * * * *

"Mr. Kenney. Most of your time, Mr. Cooke, has been taken up today in answering the questions members of the committee have put to you. I understand, however, that you come here in support of this bill.

"Mr. Cooke. Absolutely. (p 27.)

* * * * * *

"Mr. Cooke, ***

"Now, take these cooperatives: In 99 instances out of 100 they are going to buy current from existing plants. I can say, for instance, that we have been operating now for 9 months, and while we have discussed occasionally building a new power plant, as a matter of fact we have not. We have been provided in every instance where we have gone with power either from a private or a municipal plant. So, I think they are going to look upon this legislation as simply adding another outlet to the national integrated power system. There is nothing in this to hurt them." (p. 30.)

* * * * * *

"Friday, March 13, 1936

House of Representatives, Committee on
Interstate and Foreign Commerce,
Washington, D.C.

"The committee met at 10 a.m., Hon. Sam Rayburn (chairman) presiding.

"The Chairman. The committee will please come to order. Mr. Cooke, when you were interrupted, I think you had made a request to read a statement. Will you now proceed?

"Mr. Huddleston. We are here making a complete change in our orientation. This is a permanent program. It is not intended to promote work. It is intended to extend the benefits of electrification into districts that do not now have it. It is better adapted to a time of prosperity than it is to a depression." (p. 54.)

* * * * * *

"Mr. Cooke. *** There is nothing as I say here — I am trying to say it so as not to leave any impression with you or the public, that I am criticizing the private companies in this field, because I am not; but you must remember that these cooperatives are going to buy their current in practically all instances from existing plants, just as the cooperative and privately owned small telephone lines are adjuncts of the telephone system and go to give the telephone company their toll business. The line that I operate has a very heavy toll business that they give to the Bell Telephone Co. It brings about a very nice reciprocal arrangement.

"Now, there are a good many stations already where the owners of the company have said, 'God bless you', to the cooperatives. Their attitude is that they have the detail, the agony, and 'We will sell the current at wholesale.'

"Mr. Huddleston. Is it contemplated by this bill that these lines will, or may, receive current from established utilities?

"Mr. Cooke. Oh, absolutely. Take the record that we have already made. We have not built a mile of transmission line,

and I think I am right that we are not even contemplating a single new generating system. All construction thus far is taking current from the existing establishments, and I think, of course, there will be cases where isolated remoteness necessitates it or where it may be desirable to put in a diesel plant, but we have already had applications from practically every State in the Union, and thus far there had not been one case — I want to be frank, there may have been one case which we are now considering which calls for a diesel plant — but it is only contemplated, and all of the practice thus far made and all development has been on the basis of using the current of private companies or other existing plants.

"Mr. Huddleston. I am correct, am I not, in saying that the fundamental purpose of this bill is to give electric service to those who now have not that benefit?

"Mr. Cooke. Those who do not now have it.

"Mr. Huddleston. Yes.

"Mr. Cooke. Yes, sir; we have made the practice, absolutely, Mr. Huddleston, of not building any competing lines. Our current only goes to farms and farm homes that do not now have it and where, in a few instances, it has been necessary for us to parallel an existing line in order to reach that market, we have made the rule that no current is to be taken off of the line. In other words, at no point have we competed with existing lines; and I will be glad to know if any member of this committee has heard in any State of a single exception to that." (pp. 56-57.)

* * * * * *

"Saturday, March 14, 1936 HOUSE OF REPRESENTATIVES, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, WASHINGTON, D.C.

"The committee met at 10 a.m., Hon. Sam Rayburn (chairman) presiding.

"The Chairman. The committee will please come to order. We will resume with Mr. Cooke. There are some members of the committee that wanted to ask Mr. Cooke some questions.

"STATEMENT OF MORRIS L. COOKE – Resumed" (p. 67.)

* * * * * *

"Mr. Mapes. It is not quite clear to me to just what extent you enter this field of furnishing or assisting in furnishing electricity to these rural communities.

"Mr. Cooke. You mean stirring them up?

"Mr. Mapes. No. You do not propose to furnish electricity or to lend money for anyone to get electricity where it is now available, as I understand?

"Mr. Cooke. Absolutely.

"Mr. Mapes. What is the dividing line as to where it is available and where it is not available?

"Mr. Cooke. That is not a very fine line. If the farmer has not got it now, and it is not available to him – that is, the line does not go within a reasonable distance of him – we consider it not available.

"The electrical industry has taken the position, I think not uniformly, but it is generally held that if a company has not advised us where they propose to build a line and when, that that is open territory and no exception can be taken to our going in and building a line.

"Just within the last week we have had a letter – just to show you how this thing works out – we had a letter from the president of a prominent company in one of the Southern States claiming that we were violating our rule.

"We wrote him a letter saying that that rule was inviolable, and that we would immediately go after it and find what gave rise to this rumor. This morning I got word that there was a complete misunderstanding about it.

"That is absolute, Mr. Mapes. In no place has a single customer been put on where he had the opportunity to get energy from the private company before we began our operations." (pp. 72-73.)

* * * * * *

"Mr. Mapes. The language of the bill is, in effect, that you are to assist in the furnishing of electricity in rural areas where they are not receiving central station service. What is your definition of central station service?

"Mr. Cooke. That is to provide a difference between the normal service from a power line and individual Delco plants. You see you will find plenty of places where there are Delco plants along the road about as thick as the central-service-station customers are on other roads.

"Mr. Mapes. And under your interpretation of that, is anyone in the rural community who is not receiving electricity —

"Mr. Cooke. From a high line.

"Mr. Mapes. From a high line?

"Mr. Cooke. Yes.

"Mr. Mapes. You are able to service him.

"Mr. Cooke. Yes.

"Mr. Mapes. And that includes villages up to a population of 1,500, as well as farms.

"Mr. Cooke. Yes. It only refers to high-line service." (p. 73.)

D. Excerpts from House Debate on S. 3483, 74th Cong., 2d Sess. (1936).

"Mr. Rayburn. Mr. Speaker, I move that the House resolve itself from the Committee of the Whole House on the state of the Union for the consideration of the bill (S. 3483) to provide for rural electrification, and for other purposes.

"The motion was agreed to." (80 Cong. Rec., p. 5280.)

* * * * * *

"Mr. Crawford. To use a definite illustration. I have in mind a spot in the gentleman's own State which is more than 17 miles from any kind of electrical connection whatsoever, a thickly settled farming country in which the people are interested in such a proposition, and where there will probably be from 100 to 250 farm families. As I understand it, the purpose of this bill is to take care of such a situation after the project is approved by the engineers?

"Mr. Rayburn. The gentleman is correct.

"Let me say to those who fear this legislation may hurt private industry that, in my opinion, it will be one of the greatest helps to private industry. In the first place, in every situation where a rural electrification set-up is made they are going to take the power from an already established power company if they can get it at a reasonable rate." (80 Cong. Rec., p. 5282.)

* * * * * *

"Mr. Rayburn. May I say to the gentlemen that we are not, in this bill, intending to go out and compete with anybody. By this bill we hope to bring electrification to people who do not now have it. This bill was not written on the theory that we were going to punish somebody or parallel their lines or enter into competition with them. ***" (80 Cong. Rec., p. 5283.)

* * * * * *

"Mr. Luckey. Mr. Chairman, without wasting words or allowing any false impressions to be made, I want to state that I am wholeheartedly in support of the Norris rural electrification bill. ***" (80 Cong. Rec., p. 5294.)

* * * * * *

"The question arises as to whether rural electrification, as proposed in the present bill, places the Government in competition with private enterprise. Such an assumption is too foolish to merit lengthy discussion. Do these farms have electric power available? If not, where does the element of competition enter into the picture. ***" (80 Cong. Rec., p. 5295.)

* * * * * *

"Mr. Rayburn. Mr. Chairman, I yield the remainder of my time to the gentleman from Maine [Mr. Moran].

"Mr. Moran. ***"

* * * * * *

"Considerable criticism has been leveled at the plan on the grounds of supposed injury to present operating private utility companies. This criticism is unwarranted. R.E.A. lines will not compete with existing facilities. In fact, construction of

lines by cooperative associations will be to the advantage of the utility companies. With probably very few exceptions power will be purchased from present generating plants, increasing the revenues of the utilities." (80 Cong. Rec., p. 5295.)

* * * * * *

"Mr. Fletcher. ***" (80 Cong. Rec., p. 5304.)

* * * * * *

"But what is the other side of this question? What are the objections to the bill? ***" (80 Cong. Rec., p. 5307.)

* * * * * *

"So far I have not learned of any person having appeared to disapprove of the main purposes of this bill. The closest to disapproval has been a short statement made by an official of a big-business organization objecting to what he felt might eventually develop into competition with private enterprise, but, as the facts show, there is no intention that the Rural Electrification Administration will sponsor competition with private enterprise.

"As I have shown, this program does not contemplate nor permit competition with existing public utilities, and the ultimate cost will be infinitesimal in comparison with the great benefits conferred." (80 Cong. Rec., p. 5307.)

* * * * * *

"In short, the whole purpose of the rural-electrification program, present and proposed, is to develop, not the electric service that the private industry has cultivated, but the electric service which lies just beyond, and which the private industry has scorned as not immediately and alluringly profitable. There is no desire to provide loans either where service exists or where, legitimately and in truth, the power companies are about to provide service." (80 Cong. Rec., p. 5308.)